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OF
PRACTICE IN CIVIL CAUSES
IN THE
SHERIFF-COURTS OF SCOTLAND.

JOHN BAXTER, PRINTER, EDINBURGH.

HANDBOOK
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WITH AN APPENDIX OF
STATUTES AND ACTS OF SEDERUNT.

BY
JOHN DOVE WILSON,
ADVOCATE.



EDINBURGH:
BELL & BRADFUTE, 12 BANK STREET.
MDCCCLXIX.

TO

THE RIGHT HONOURABLE LORD CAIRNS.

MY LORD,

In the following Work I have endeavoured to give an account of the Constitution, Jurisdiction, and Rules of Practice of the Courts of the First Instance, appertaining to a system in whose highest Court of Appeal you lately presided ; and, in availing myself of the kind permission to dedicate the work to your Lordship, I venture to hope that you may not find it altogether uninteresting to see how the office of Sheriff, which (though derived in both instances from the same Anglo-Saxon source) in England soon sank beneath the influence of the Central Courts to the performance of merely executive functions, in Scotland has retained much of its original jurisdiction, has found its place among the more modern tribunals, and continues to perform—as I believe with general and warm approval—a very large proportion of the judicial work of the country.

I have the honour to remain,

My LORD,

Your Lordship's most obedient Servant,

J. DOVE WILSON.

PREFACE.

THERE can be no question of the great importance of that branch of the law which treats of the modes in which rights are enforced. To the Public it is perhaps the most important branch, because, unless its provisions are arranged in such a manner as to permit the quick, certain, and inexpensive settlement of disputes, the provisions of all the other branches of the law may remain to a great extent inoperative. Unfortunately it is the branch which, of all others, has the fewest attractions to the Lawyer, and in Scotland, in recent years, it has been comparatively neglected. The law in consequence has suffered both in substance and in form. In substance the deficiencies are not so marked; but the form of the law is about as inconvenient as can well be imagined. The law of process, which in any well considered system ought to be embodied in a code, has to be searched for in Scotland through innumerable decisions, through many statutes and many rules of Court, hardly one of which is complete in itself; and which, taken altogether, extend over such a long period of time, and fill such a mass of literature, as to make the extrication of the practical rules a task of serious difficulty.

The Royal Commission, at present inquiring into the Judicial System of Scotland, may be expected to effect, or at

least to originate measures calculated in due time to effect, great improvements in the law of process, and I had it in doubt whether, at the present juncture, I should publish this treatise. But as it must be some time before the Commission can report, and as a still longer time must elapse before legislation can follow upon the consideration of their report, I have thought that the treatise might prove useful to the profession in the meanwhile. A strong inducement to take the course of now issuing the treatise was, that I would have the opportunity of incorporating, with the older practice, the very important legislative changes made in 1868.

The object of the treatise is to present an account of the Constitution, Jurisdiction, and Practice of the Sheriff-Courts in Civil Causes, in as clear, concise, and systematic a form as may be possible. I have endeavoured to resist the temptation to digress into matters which would not be of practical use; and I have not entered upon historical researches further than was necessary at times to explain proceedings which might otherwise have appeared anomalous. The plan of the work is, *firstly*, to explain the constitution and jurisdiction of the Sheriff-Court; *secondly*, to trace the ordinary action for the payment of money, from beginning to end, giving (in separate chapters) the normal proceedings that occur in almost every action, the occasional proceedings required in exceptional circumstances, the right of appeal from the Sheriff-Substitute to the Sheriff, and the mode of enforcing the final judgment; *thirdly*, to take each of the special forms of action competent, and to explain wherein it differs from the ordinary action; and, *fourthly*, to point out wherein the summary civil procedure authorised by the Small Debt Act of 1837, and the Debts Recovery Act of 1867, differs from the ordinary procedure. This concludes the proper work of the Sheriff-Court; but to complete a practical treatise there is required, *fifthly*, an account of the jurisdiction

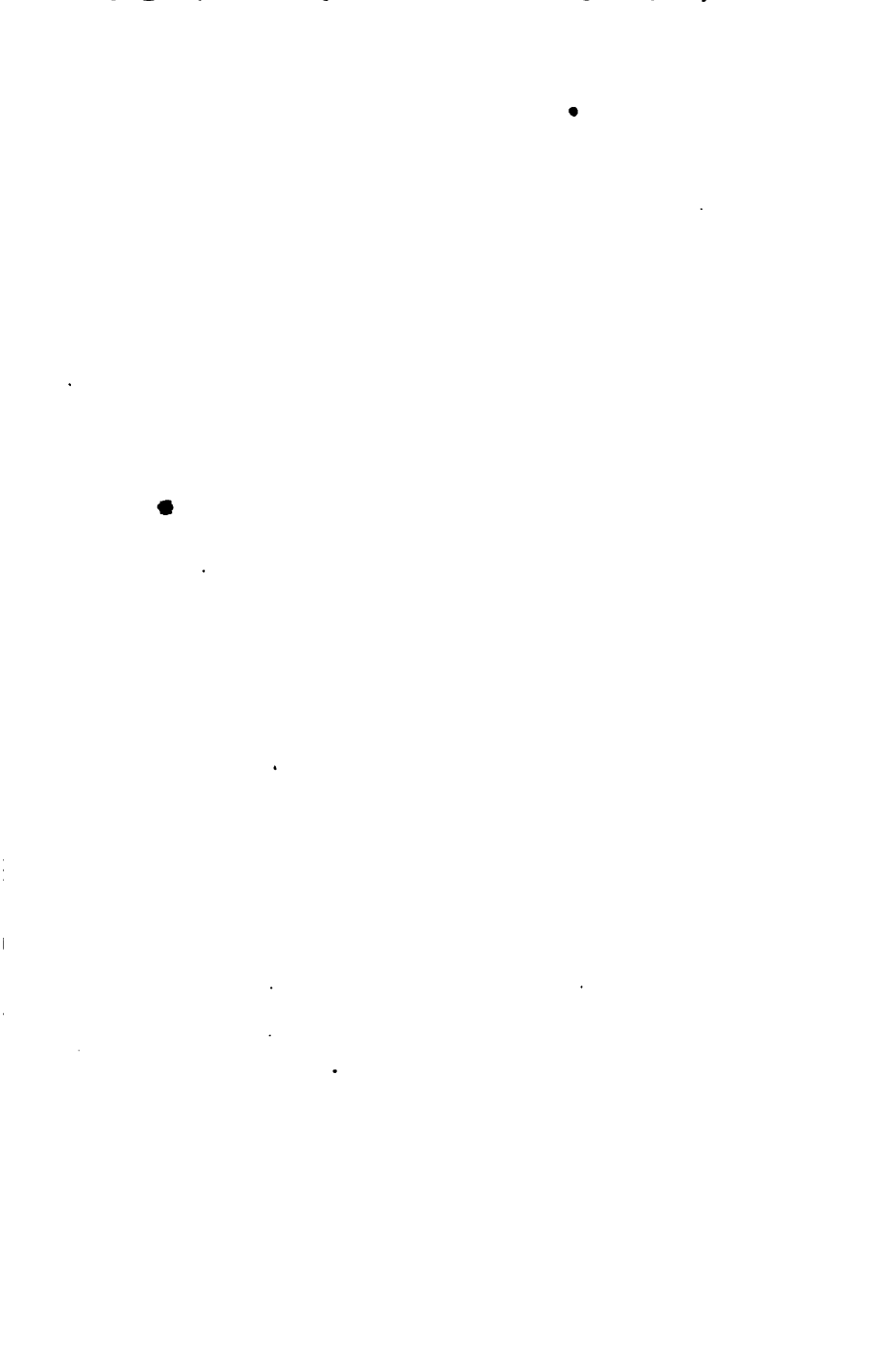
which the Sheriff exercises as Commissary; and, *sixthly*, an account of the various modes of appealing from the decisions of the Sheriff-Court to Higher Courts; and these subjects I have added. In the Appendix are contained the Acts of Parliament and Acts of Sederunt required in practice; and in the Schedules to these various Acts will be found the forms in common use.

The experience I have had for some years as a Sheriff-Substitute has, I trust, been useful to me for the present work; and I have been fortunate enough to have had valuable assistance in its preparation. Mr Sheriff Smith, of Elgin, has not only assisted me in the earlier stages of the work, but in going over the proof sheets, has given me the benefit of numerous and most useful suggestions. For much assistance of the same kind, in the department which comes more directly under the notice of the Clerks of Court than under that of the Judges, I am indebted to Mr John Grant Leslie, Sheriff-Clerk-Depute of Aberdeenshire, and to Mr Alex. Gordon Brown, Sheriff-Clerk-Depute of Kincardineshire, the former of whom, in reading the proof sheets, has communicated the benefit of a very long experience. To Mr A. Ellison Ross, S.S.C., I am indebted for the preparation of the Index. In conclusion, I have to add that, in a work which for its size involves an unusual amount of detail, I can scarcely hope to have altogether avoided inaccuracies; but that if any reader should discover either error or defect, he will do me a favour if he will inform me of it.

J. D. W.

STONEHAVEN, KINCARDINESHIRE,

March 1869.



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HANDBOOK

OF

SHERIFF-COURT PRACTICE.

ERRATA.

Page 167, title of article 8, *delete* "not "

Page 168, title of article 9, *for* "Case of parties being the same,"
● *read* "not being the same."

Page 339, line 12, *for* "no case does the note " *read* "the last case
the note does not."

THE Judges of the Sheriff-Court are two in number—the Sheriff, and the Sheriff-Substitute. Previous to the Heritable Jurisdiction Act,(a) there were three classes of Judges. The High Sheriff was the Judge Ordinary of the County, and was generally one of the larger landed proprietors. He appointed a Depute (usually, although not always, a lawyer), by whom the great proportion of the duties was discharged. The Sheriff-Depute, again, appointed one or more Sheriffs-Substitute to act in his absence.(b) On the passing of the Heritable Juris-

(a) 20 Geo. II., c. 43.

(b) "One named by a deputy who has himself the power of deputation, is called a substitute;" Ersk. 1. 2. 13.

The Sheriff.

diction Act, the High Sheriff was prohibited from judging personally in any cause, civil or criminal; the power of appointing the Sheriffs-Depute was taken from him; and it was enacted that the Sheriffs-Depute should be appointed by the Crown, and should have the power of naming the Sheriffs-Substitute. The office of High Sheriff is now almost an honorary office, and is in general held by the Lord Lieutenant of the county.(c)

1. **The Sheriff.**—The qualification of the Sheriff-Depute was fixed by the Heritable Jurisdiction Act at that of an Advocate of three years' standing, and the office was appointed to be held *ad vitam aut culpam*. The Act also made various regulations as to residence for a certain part of the year within the county, but these have all been abrogated, and none of the Sheriffs-Depute are now bound to residence, with the exception of the Sheriffs of Edinburgh and Lanarkshire, who, by a subsequent Act, must reside within six miles of Edinburgh and Glasgow respectively. The Sheriffs of the other counties are now bound to attend the sittings of the Court of Session, but hold certain Courts annually within their counties.(d) By an Act passed in 1828,(e) the name of Sheriff-Depute (which, in so far as regarded the judicial duties of the Sheriff, had evidently become a misnomer) was virtually changed to that of Sheriff. By an Act passed in 1853 (f) the number of Sheriffs was diminished,—their duties having considerably changed both in amount and character through the effect of the legislation of the first half of the present century. From having been Judges Ordinary of the County, the Sheriffs have risen to be mainly Judges of Appeal on the decisions of the Sheriffs-Substitute, against which appeal to them is competent. But (in

(c) The words Steward and Steward-Substitute, which occur in some of the older Acts of Parliament, need not be used now, as they are declared to be included under Sheriff and Sheriff-Substitute; 1 Vict., c. 89.

(d) 3 Geo. IV., c. 49; 1 and 2 Vict.,

c. 119, § 2; 16 and 17 Vict., c. 80, § 46.

(e) 9 Geo. IV., c. 29, § 22, providing "that the Sheriff-Depute may be addressed by the title of Sheriff without the term Depute being added."

(f) 16 and 17 Vict., c. 92.

Sheriff-Substitute.

so far as the duty of attending the Court of Session permits) they still have the power of judging in the first instance when they choose to exercise it; and in some cases they are still bound to act in that capacity—as, for example, in the Small Debt Circuit Courts, which they are bound to hold once in each year.

2. Sheriff-Substitute.—The qualification for Sheriff-Substitute is that he has been admitted an Advocate, or an Agent in the Court of Session or in one of the Sheriff-Courts, at least three years before his appointment. This qualification was introduced by an Act passed in 1825, by which time the duties devolved on the Sheriff-Substitute had rendered some such provision necessary. His commission must have annexed to it a certificate by the Lord President of the Court of Session and the Lord Justice-Clerk, bearing that he is duly qualified and capable to discharge the duties of the office.^(g) The Sheriff-Substitute formerly held office during the pleasure of the Sheriff who had appointed him, and the commission expired at his death; but (the importance of the office having continued to increase) it was enacted in 1838 that the Sheriff-Substitute should not be removed except with the consent of the Lord President and Lord Justice-Clerk; and that, notwithstanding the death, resignation, or removal of the Sheriff, the Sheriff-Substitute should still hold office, and exercise all the powers belonging to it.^(h)

(g) 6 Geo. IV., c. 23, § 9. "No person shall be appointed a Sheriff or Stewart-Substitute of any county or stewardry in Scotland who shall not be an Advocate of three years standing at the least, or a Clerk to His Majesty's Signet, or a Solicitor before the Supreme Courts of Scotland, or a Procurator admitted to practise before a Sheriff-Court in Scotland, and who shall not have been admitted to practise as such Clerk to the Signet, Solicitor, or Procurator for at least three years previous to his appointment; and that no such commission ap-

pointing any such person a Sheriff or Stewart-Substitute shall be valid, or enable any person to do any act by virtue thereof, unless and until there shall be annexed thereto a certificate under the hands of the Lord President of the Court of Session, and the Lord Justice-Clerk, bearing that such person is duly qualified, and capable to discharge the duties of the said office, which certificate, after due inquiry, the said Lord President and Lord Justice-Clerk are hereby required either to grant or to refuse."

(h) 1 and 2 Vict., c. 119, §§ 3 and 4.

 Sheriff-Substitute.

The Sheriffs-Substitute were for long permitted to carry on business in their counties; but as the office came gradually to require more and more of their time, and they assumed more and more of the position of professional judges, it was felt that this was unseemly, and they were prohibited from doing so. The Act of 1825, by which this was first done, prohibits them from acting, directly or indirectly, as Procurator before any Court in the county,⁽ⁱ⁾ and the Act of 1838 carries this farther by prohibiting them from acting as agent either in legal banking or other business, or as conveyancer, factor or chamberlain, except for the Crown, and from being appointed to any office, except such offices as are by statute attached to his own. The Sheriff-Substitute is also bound to residence within his county.^(k)

Several of the larger counties are divided into districts, to each of which a Sheriff-Substitute is attached, but the commissions extend over the whole county.^(l)

The Sheriff-Substitute is the resident Judge Ordinary of the county, with the full power (subject to such review as may be competent) of doing every judicial act which might be done by the Sheriff.^(m) In the words of Lord Ormisdale—"Having regard to the terms in which the commission in favour of a Sheriff-Substitute is always expressed, as well as to the essential nature of the office, he is vested with and entitled to exercise (except when it should otherwise appear either from declarator or fair and necessary inference) all the power, jurisdiction and authority pertaining to the office of Sheriff."⁽ⁿ⁾

(i) 6 Geo. IV., c. 23, § 10. "No Sheriff or Stewart-Substitute shall act directly or indirectly as a Procurator before any Court in the county or stewartry of which he is Sheriff or Stewart-Substitute, or shall be in partnership with any person so practising."

(k) 1 and 2 Vict., c. 119, § 5. The section regulates the period for which the Sheriff-Substitute may be absent from the county, and the provision which must

be made for carrying on the business during his absence.

(l) 16 and 17 Vict., c. 80, § 40.

(m) There are some acts of an administrative character which a few special provisions in statutes have made competent only to the Sheriff, but with these the present volume is not concerned.

(n) *Fleming v. Dickson*, 19 Dec. 1862, 1 Macph. 188.

Honorary Sheriff-Substitute.

3. **Honorary Sheriff-Substitute.**—In addition to the salaried Sheriff-Substitute, it is the custom in all counties to have one or more Honorary Sheriffs-Substitute empowered to act for him during his temporary absence or incapacity. The provisions of the Act of 1825, already referred to, in regard to the qualifications of Sheriffs-Substitute, do not expressly except Honorary Substitutes; but it is shewn by the context that those provisions were not meant to apply to them, and in practice they are not held as applicable. Neither is the restriction of the Act of 1825, that a Sheriff-Substitute may not be a Procurator, held to apply to them. Were the Act held to apply, it would often be impossible to have any Honorary Substitutes. The same grounds on which it is considered that an Honorary Sheriff-Substitute does not require to be certified as fit for the office by the Lord President and Lord Justice-Clerk, exempt him from the operation of the clause prohibiting him from being a Procurator.(o) In practice, Procurators are not appointed, unless in exceptional circumstances. It is, of course, clear that a Procurator so appointed could not act in any cause in which he was himself in any way interested.(p) The regulation in the Act of 1839 prohibiting Sheriffs-Substitute from acting as agents, and in similar capacities, applies expressly only to the salaried Sheriffs-Substitute. Honorary Sheriffs-Substitute are removeable at the pleasure of the Sheriff, but the commissions do not seem to fall by the fact of his ceasing to hold office.(q)

(o) The Act of Sederunt of 6 March 1783, which regulated this matter previous to the Act of 1825, prohibited (in general terms) all Sheriffs-Substitute from acting directly or indirectly in any action or cause depending or to depend before them. This was passed before the distinction between salaried and honorary Sheriffs-Substitute was recognised, salaries having been first paid by the Crown in 1786. A majority of the judges thought that even it did not apply to

honorary Sheriffs-Substitute (*Mackintosh v. Mackenzie*, 18 Nov. 1818; *affd.* 1819, 1 Bligh. 272); but that opinion must have been wrong (*Adam v. Cunningham*, 5 July 1824, S. Inst. R., 117).

(p) It was once held that the Sheriff-Clerk might be honorary Sheriff-Substitute, but this would not now be followed; *Binning v. Cook*, 24 Jan. 1711, M. 7662. See *Stewart*, 22 April 1857, 2 Irving, 614, and 29 S. J. 344.

(q) 1 and 2 Vict., c. 119, §§ 3, 4 and 5.

 Commissaries—Sheriff-Clerk.

4. **Commissaries.**—The Sheriffs and Sheriffs-Substitute also hold commissions as Commissaries and Commissaries-Depute respectively. When the Inferior Commissary Courts were abolished in 1824,(*r*) most of the Sheriffs were appointed Commissaries, and when the Supreme Commissary Court was abolished in 1830,(*s*) the remaining Sheriffs were likewise made Commissaries. The same Acts made the Sheriffs-Substitute Commissaries-Depute. But as all the important actions which could be raised in the Consistorial Courts were at the same time transferred to the Court of Session, the powers which the Sheriffs exercise as Commissaries are very limited, and are confined mainly to matters arising in cases of succession by death to moveable property.

5. **Sheriff-Clerk.**—The Sheriff-Clerk is appointed by the Crown,(*t*) and holds office *ad vitam aut culpam*. He is bound to do the duties of the office personally;(u) but this does not prevent him from appointing deputies to assist him in the performance of his duties, or to act during his necessary absence.(*v*) Though there is no statute directly sanctioning such appointments, there are numerous statutes in which they are recognised. The Sheriff-Clerks and their deputies are prohibited from practising, either directly or indirectly, before their Courts,(*x*) and if they do so, all the proceedings in which they have been thus concerned are null.(*y*) This disqualification, however, does not apply to suits in which they are personally

(*r*) 4 Geo. IV., c. 97, §§ 6, 8 and 10.

(*s*) 11 Geo. IV., and 1 Will. IV., c. 69, § 30.

(*t*) In the case of any temporary vacancy in the office, the Court of Session can make an interim appointment.

(*u*) 6 Geo. IV., c. 23, § 6:—"Every person who has been appointed since the 1st day of August 1814, or who shall hereafter be appointed a clerk in the said Sheriff or Stewart Courts, shall discharge the duties of the said office personally."

(*v*) *Heddie v. Garioch*, 1 March 1827, 5 S. 503. In this case the Commission contained (as it is believed usually to do) a power to name deputies; but the absence of such a provision would not alter the power, as the words of the Commission cannot confer it, and it must be possessed in virtue of the common law, or not at all.

(*x*) A. S. 10th July 1839, § 160.

(*y*) *Smith v. Robertson*, 27th June 1827, 5 S. 848.

Commissary-Clerk—Auditor—Procurators.

interested; and Procurators who may be appointed deputies for the Small Debt Circuit Courts are not disqualified from acting except in the Court to which they belong.(z)

6. **Commissary-Clerk.**—The clerks in the Commissary-Court are still separately appointed from those in the Sheriff-Court, and the appointments are in general held by different persons. They are appointed by the Crown, and are bound to perform the duties of the office in person.(a) Their commissions usually contain the like power to appoint deputies as those of the Sheriff-Clerks. They are prohibited from practising, either directly or indirectly, before their Courts.(b)

7. **Auditor.**—The Auditor of Court is appointed by the Sheriff, and holds office during his pleasure. The office may be held by the Sheriff-Clerk or by one of the Procurators, and there is no restriction upon the Auditor engaging in practice.

8. **Procurators.**—The admission of Procurators is now regulated by an Act passed in 1865.(c) The Act contains some regulations relative to the admission of those who were serving apprenticeships previous to its passing, and (together with an Act of Sederunt(d) passed to carry it into effect) makes the following conditions in regard to the qualifications of future applicants:—

1. That he shall be 21 years of age :
2. That he shall have served an apprenticeship of at least four years to some competent master :
3. That he pass such examinations in the course of the apprenticeship as may be instituted by the special Corporation or Faculty to which he is applying :

(z) 1 Vict., c. 41, § 25.

(a) 4 Geo. IV., c. 97, § 14 :—“ Every person henceforth to be appointed a Commissary Clerk shall perform his duty in person.”

(b) A. S. 6th March 1783.

(c) 28 and 29 Vict., c. 85.

(d) See the Curriculum and Bye-Laws prepared by the General Council of Procurators, printed in the Appendix.

Procurators.

4. That after 1st January 1868, he produce evidence of having attended certain University Law Classes :

5. That he pass an entrance examination.

In the case of Graduates in Arts the apprenticeship may be for three years only, and the entrance examination does not embrace general knowledge. Practitioners before the Supreme Courts, and Procurators or Sheriff-Clerks, are competent masters, and the apprenticeship may be varied by serving one year as a clerk with another master. All indentures must be recorded within six months from the date of their commencement, and agreements to serve as clerks must be entered into in writing before the commencement of the service.(e) The entrance examination embraces general knowledge, law, legal training, and practice, and is conducted under certain regulations, which have been adopted by the General Council of Procurators, and approved of by the Court of Session. Practitioners before the Supreme Court, and Bachelors of Laws of the Scotch Universities, are exempt from examination. In addition to the general regulations there are special regulations applicable to Faculties, such as those which practice before the Courts in Edinburgh, Glasgow, and Aberdeen, which have special privileges and charters of incorporation.

Procurators can practice only in the Court before which they are admitted. If there be more than one Court in a county, they may practice in one or all of them according to the nature of the local regulations. In some special actions, which were formerly competent only before the Court of Session or Consistorial Courts, agents in the Court of Session may practice in the Sheriff-Court.

It is not essential that every litigant in the Sheriff-Court should appear by a Procurator. Litigants may appear and plead in their own behalf, and may lodge papers signed by themselves alone.(g) The only point in regard to this which

(e) As to the stamp on indentures see 30 and 31 Vict., c. 96, § 23 (App. clxxxix).

(g) A. S. 10 July 1839, § 68 (App. liii).

Officers of Court.

is doubtful is, whether a party may by himself take out a writ of summons. The doubt, however, is created mainly by the words of a regulation requiring the summons to have the name of the Procurator marked on the back,^(h) and this, it seems to the author, cannot be taken as more than an incidental provision, directory of what is to be done if the pursuer has a Procurator, but not compelling him to have one, or taking away his common law right to act for himself in the absence of express regulation to the contrary.

The privilege of "borrowing processes" is possessed by Procurators alone.⁽ⁱ⁾ The Clerk of Court cannot intrust the proceedings to parties over whom the Court has little or no control, and for whom no one is responsible. Parties pleading their own causes must be content to see the process in the office of the clerk. Farther, it is only Procurators resident within the jurisdiction of the Court who can borrow; and this regulation is applicable to agents in the Court of Session, practising in the class of cases to which they are competent, as well as to the proper Sheriff-Court agents.

The Procurator-Fiscal is the procurator who is charged with the prosecution of criminal offences on behalf of the Crown. In a work which extends only to practice in civil causes, it is unnecessary to treat of his office. There are extremely few civil cases in which his intervention is required, and his functions in regard to these will be noticed in connection with them.

9. Officers of Court. — Sheriff-Officers are the persons by whom writs are served and executions carried out in the Sheriff-Courts. They are admitted by the Sheriff, to whom they apply by a petition, which is usually remitted to two or more of the Procurators, to examine them as to their qualifications. In some counties the Sheriff conducts the examination himself. On the applicant being found duly qualified he is admitted, and the oath *de fidei* administered. He then requires to find

(h) A. S. 10 July 1839, § 8 (App. xlv).

(i) A. S. 10 July 1839, § 159 (App. lxvii).

 Officers of Court.

caution for the due performance of his office. Should the cautioners die or resign, their place must be immediately supplied. Sheriff-Officers continue to act during their good conduct; and for misconduct may be dismissed or suspended by the Sheriff.

A Sheriff-Officer, like a Procurator, can, in civil matters, act only within the jurisdiction of the Sheriff who has admitted him, except in Small Debt actions, where he may serve warrants in other counties after they have been indorsed by the Sheriff-Clerk in terms of the Small Debt Act.^(k) Messengers-at-Arms may also (it is said) execute writs in the Sheriff-Court,^(l) but it has been doubted whether they can act in Small Debt cases. Sheriff-Officers may in turn act in some cases in writs issuing from the Court of Session.⁽ⁿ⁾

Some regulations as to the admission of Sheriff-Officers, which have been adopted in various counties, will be found in the Appendix.^(o)

 CHAPTER II.

 OF THE MATTERS IN WHICH THE SHERIFF-COURT
HAS JURISDICTION.

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| 1. <i>Introductory.</i> | 10. <i>Special Matters relating to Heri-</i> |
| 2. <i>Moveable Rights.</i> | <i>tage.</i> |
| 3. <i>Actions of Damages.</i> | 11. <i>Questions of Status.</i> |
| 4. <i>Privative Jurisdiction in Move-</i> | 12. <i>Actions of Alimēt.</i> |
| <i>ables.</i> | 13. <i>Succession.</i> |
| 5. <i>Heritable Rights.</i> | 14. <i>Bankruptcy and Insolvency.</i> |
| 6. <i>Nuisance and Servitudes.</i> | 15. <i>Admiralty Jurisdiction.</i> |
| 7. <i>Rents.</i> | 16. <i>Poor-Relief and Lunacy Acts.</i> |
| 8. <i>Feu-Duties.</i> | 17. <i>Elections.</i> |
| 9. <i>Removings and Ejections.</i> | 18. <i>Conclusion — Incidental Treat-</i> |
| | <i>ment of Incompetent Matters.</i> |

1. *Introductory.*—The simplest description of the extent of the jurisdiction of the Sheriff-Courts is to say that it ex-

(k) 1 Vict. c. 41, § 84.

(n) 31 and 32 Vict. c. 100, § 19.

(l) See *Finlayson v. Innes*, 28 Feb. 1808, 4 Paton, 443.

(o) App. part ix, p. cccxxv.

Moveable Rights—Damages—Privative Jurisdiction in Moveables.

tends over every kind of right, with only two important exceptions. There being in Scotland no recognised separation between law and equity, there is no exception to the jurisdiction on that ground. The exceptions arise (1) in questions as to the title to heritable property; and (2) in questions as to status and legitimacy, depending on the validity or invalidity of any alleged marriage, divorce, or separation. There are other important exceptions to the jurisdiction which arise from its being incompetent to ask for certain remedies in the Sheriff-Court, and these will be considered in the following chapter. In the meantime, it is necessary to consider, more in detail, the rights on which the Sheriff-Court can decide.

2. Moveable Rights.—In rights relating to moveable or personal property, the jurisdiction of the Sheriff is unlimited. There may be certain remedies which he cannot give, but there is no question as to moveable right which either its nature or amount prevents him from deciding. Thus, he decides in all questions arising out of mercantile transactions,—sales, loans, bills of exchange, partnership accounts, executory contracts, contracts of service, contracts with carriers, and the like; and that whether the question is as to the right to specific implement of an obligation, or as to the right to damages for non-implement.

3. Actions of Damages.—Among the actions of damages for breach of contract which the Sheriff-Court can entertain, are actions for damages for breach of promise of marriage, there being here no question raised as to status. Other actions on breach of contract do not require to be particularised. In addition to such actions, the Sheriff may try questions as to the right to damages for delict, such as arise in actions of damages for slander and libel, seduction, assault, or any injury to person or property, whether accidental or intentional.

4. Privative Jurisdiction in Moveables.—Where the value

Heritable Rights.

of the action does not exceed £25 sterling, the Sheriff-Court has a privative jurisdiction. It is incompetent to bring such an action in the Supreme Court,^(a) or (except to the limited extent permitted by the Small Debt Act) to appeal such an action from the Inferior Court.^(b)

5. Heritable Rights.—As already pointed out, the Sheriff-Court cannot decide on title to heritable property, however small in value the property may be. When disputes arise in regard to heritage, the power of the Sheriff-Court is confined to that of regulating the interim possession. For this purpose it may pronounce what are called possessory judgments; and those are founded upon the state of possession as it has existed for the preceding seven years. This state of possession the Sheriff can protect from interruption; or if it have been disputed, may regulate. Thus, for example, the Sheriff secures from summary interruption a party who has been in peaceable possession of an heritable subject for seven years, though he has no *ex facie* title, provided he allege the existence of a right;^(c) but he cannot decide the question whether a title is good, or, if there be two titles produced, which of them is the better. In such cases it is his province to regulate only the possession till the dispute is settled by the competent Court, and he cannot look at the titles for any other purpose than

(a) 30 Geo. III. c. 112, § 28:—"All causes not exceeding the value of twenty-five pounds sterling shall, from and after the passing of this Act, be carried on in the first instance before the Inferior Judges in the manner directed, and with the exceptions specified in an Act passed in the third session of the second Parliament of H. M. King Charles the Second, intituled, *Act concerning the Regulation of the Judicatories*." The Act here referred to (1672, c. 40, § 16) had enacted "to the effect, the Lords of Session may be in better capacity to discuss the processes which come before them, not

being over burdened with small and inconsiderable causes, that all causes not exceeding the value of two hundred merks Scots [about £11, 2s. 6d.] be in the first instance carried on before the Inferior Judges." The exceptions in this Act (so far as not in desuetude) related to the privileges of the College of Justice, and have been repealed (*infra*, cap. iv. art 7).

(b) 16 and 17 Vict. c. 80, § 22.

(c) *Bridges v. Elder*, 5th March 1822, 1 S. 417. For the sake of keeping the peace, he might prevent even an intruder from being forcibly dispossessed.

Nuisance and Servitudes—Rents.

that of assisting him to decide on the possessory point.(d) In a question between a party having a title and a party alleging none, the Sheriff may dispossess the latter, though his possession may have been longer than the seven years, there being no question of title involved.(e)

6. Nuisance and Servitudes.—There are two matters relating to heritable rights in which the Sheriff-Court have by special statute full jurisdiction. These are matters of nuisance arising from the use of real property, and questions of servitudes. In regard to these they are entitled to decide, not merely in so far as regards the question of possession, but also in regard to the question of right. Thus, where anything is complained of as a nuisance, the Sheriff-Court is not precluded from ordering its discontinuance upon proof that it has existed for more than seven years; and in the same way in regard to servitudes, it is not limited to considering the state of possession for the preceding seven years, but it may enter into all such questions as those affecting title, immemorial possession, or prescriptive possession, requisite for the decision of the question of absolute right, and it may pronounce decisions affecting the right itself.(g)

7. Rents.—The Sheriff-Court has jurisdiction to entertain all questions in regard to the payment of rent, not turning on the title to the land. It sequestrates if the rent be not paid in time, or there be reason to fear its loss. It decides all questions as to whether rent is due by the tenant; as to its amount; and as to any deductions to be made from it. And generally it decides all questions arising between the landlord and the tenant as to the terms of leases, or other writings on which

(d) *Maxwell v. The Glasgow and South-Western Railway Co.*, 16 Feb. 1866, 4 Macph. 447; *Johnstone v. Murray*, 5 March 1862, 24 D. 709; *Lidon v. Galloway*, 8 Dec. 1835, 14 S. 97.

(e) *Nisbet v. Aikman*, 12 Jan. 1866, 4 Macph. 285.

(g) 1 and 2 Vict. c. 119, § 15. *Brown v. Currie*, 1 Feb. 1843, 5 D. 463; *Thomson v. Murdoch*, 21 May 1862, 24 D. 97

 Feu-Duties—Removings and Ejections, &c.

possession is held. Such a question, for example, as whether a tenant was entitled to compensation for improvements could be decided in the Sheriff-Court.

8. **Feu-Duties.**—Where no question of heritable right is raised, the Sheriff-Court can entertain actions for the payment of feu-duties, annualrents, or other sums due for the occupation of heritable property under longer tenures than mere leases. But except by giving decree for the sums thus due, when the heritable right to them is not in dispute, in the same way as if the action were for a personal debt, it cannot interfere. It cannot, for example, pronounce a decree of irritancy *ob non solutum canonem*, so as to remove the vassal—excepting always under the Statute of 1853,^(h) in the special case of the subjects not exceeding in yearly value the sum of twenty-five pounds.

9. **Removings and Ejections.**—The Sheriff-Court has jurisdiction to decide all actions of removing at the instance of a landlord against a tenant whose right to occupy has expired. It decides upon the question (if it be in dispute) whether the tenant's right has expired; and it has power to settle all questions in regard to the conditions on which the occupancy is to be ceded. It is hardly necessary to add that it decides on actions of removing, whether they have been raised under the special Act of Sederunt regulating them,⁽ⁱ⁾ or under the Act of 1838,^(k) or under the Act of 1853;^(l) but it is requisite to point out that its jurisdiction under these Acts is privative.

Ejections differ from removings in this, that they are not the bringing to an end of a legal title of possession, but the removal of a person who alleges no title, or whose title has already been brought to an end by decree of a competent Court.

10. **Special Matters relating to Heritage.**—Under various special powers the Sheriff-Court can entertain various other

(h) 16 and 17 Vict. c. 80, § 32.

(i) A. S. 14 Dec. 1756.

(k) 1 and 2 Vict. c. 119, § 8 (App. xxii).

(l) 17 and 18 Vict. c. 80, § 29.

Questions of Status—Actions of Aliment.

matters relating to heritable subjects, such as actions of constitution and adjudication; of adjudication in implement; of mails and duties; of straightening marches; of the division of run-rig lands; certain proceedings in connection with entails, &c., but as the jurisdiction thus conferred is exercised in special forms of actions which will have to be treated of afterwards, the extent of the jurisdiction will also be treated of then.

11. Questions of Status.—The Sheriff-Court has no jurisdiction to entertain questions of rank or status. It cannot, for example, entertain any question whether any person is entitled to the status of wife, or to that of legitimate child of another. Neither can it pronounce a divorce, or even a decree of separation *a mensa et thoro*, or any decision in questions between husband and wife depending on the right of one or other to these remedies. The Sheriff has no power to deal with the matter of the permanent custody of children; but in cases of emergency he may regulate the interim custody.(n)

12. Actions of Aliment.—In aliment cases the Sheriff-Court has jurisdiction. It is the usual Court in which actions for the aliment of illegitimate children are raised; and for the purposes of these actions it decides incidentally questions of filiation. These actions, however, though usually called actions of aliment, are properly actions of debt; but the Sheriff-Court has also jurisdiction in the proper equitable action of aliment. For example—no question of status being raised—it decides questions as to aliment between parent and child or even between husband and wife. But wherever any question is raised affecting status,—as, for instance, whether a husband is entitled to exercise all the rights by law belonging to him, or whether he has forfeited any part of them by cruelty or desertion—the power of the Sheriff-Court is limited to awarding interim aliment for such reasonable time as will permit the injured party to

(n) Fraser on the Law of Parent and Child, by Cowan, p. 81, and authorities there cited.

Succession—Bankruptcy and Insolvency—Admiralty Jurisdiction, &c.

raise the question of her right to permanent aliment before the Higher Court.(o)

13. Succession.—In matters of succession the Sheriff-Court has an extensive jurisdiction. In moveable succession, the Sheriff (as Commissary) not only decides all questions as to who is to have the management of the estate of the deceased, but (in the Ordinary Court) he also decides all questions relative to its distribution. In regard to heritage, his duties are limited to the service of heirs under the Titles to Land Consolidation Act. The jurisdiction of the Sheriff in matters of succession will be found to be treated of in the chapter on the Commissary Courts, and in the section on the Service of Heirs.

14. Bankruptcy and Insolvency.—In bankruptcy and insolvency the Sheriffs have also jurisdiction. Their jurisdiction in bankruptcy cases is regulated under special statutes. As these statutes have been made the subject of several excellent treatises, and as their consideration would unduly increase the dimensions of this work, bankruptcy will not be here treated of. In insolvency, the duty of the Sheriff is concerned with the giving or refusing of personal protection in the process of *cessio bonorum*, which will be considered in its proper place.

15. Admiralty Jurisdiction.—In maritime cases the Sheriff has in the first instance the same jurisdiction, within his county and the adjoining seas, as the High Court of Admiralty formerly possessed over Scotland; and in all maritime-cases under the value of £25 he has privative jurisdiction. These matters will be treated of in the portion of this work dealing with maritime cases.

16. Poor Relief and Lunacy Acts.—Under the Poor Law Acts the Sheriff decides certain questions as to the right of

(o) 11 Geo. IV., and 1 Will. IV. c. 69, § 82 (App. iii.), and *infra* "Of Actions of Aliment."

Conclusion—Incidental Treatment of Incompetent Matters.

paupers to relief, and under the Lunacy Acts he decides as to the commission of lunatics to asylums. The forms for these proceedings will be considered in their proper place.

17. Elections.—In regard to the election of members of Parliament, the Sheriff has also numerous duties to perform, but as these are in no way connected with his ordinary duties in civil causes, and have besides been made the subject of a special treatise, they will not be treated of here.

18. Conclusion—Incidental Treatment of Incompetent Matters.
—It is needless here to go over the different instances in which the Sheriff exercises special powers, as these, where of any importance, and where it will be of any service, will be noticed in the chapter treating of the special actions in the Sheriff-Court. One observation only is needed to complete the survey of the Sheriff's jurisdiction, and it is this,—that the Sheriff-Court may have occasion to entertain incidentally matters upon the absolute right to which it could pronounce no decision. Thus, if the question at issue in a case be simply whether or not a certain debt is due, the Sheriff-Court may determine incidentally (in order to find out if that debt is due) questions such as those of status and legitimacy. But in this case its decision will have no weight upon the question of status. It will decide merely whether or not the particular debt is to be paid, and there its effect will end. In like manner, though the Sheriff cannot in his Criminal Court decide upon what are called the Four Pleas of the Crown with a view to the punishment of the offenders, he can decide upon them in the Civil Court when they are made the foundation of a claim for damages. The ramifications of this principle are both various and extensive, and it is important to have it in mind, as its application is of almost daily occurrence.

Introductory—Declarators Incompetent.

CHAPTER III.

OF THE REMEDIES COMPETENT IN THE SHERIFF-COURT.

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| <ul style="list-style-type: none">1. <i>Introductory.</i>2. <i>Declarators Incompetent.</i>3. <i>Proving the Tenor Incompetent.</i>4. <i>Reductions Incompetent.</i> | <ul style="list-style-type: none">5. <i>Competent Remedies—Orders for Payment of Money.</i>6. <i>Orders ad factum præstandum.</i>7. <i>Special Remedies.</i> |
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1. *Introductory.*—The remedies competent in the Sheriff-Court vary greatly according to the nature of the rights involved. In general, where the Sheriff-Court has jurisdiction to deal with a matter, it can give all the remedies which are required; but the remedies which the Sheriff-Court gives are all in their nature precise and specific. They direct either the payment of some precise sums of money, either specified at once, or to be ascertained in some specified manner, or they direct that some one shall do or refrain from doing some specified act. The Sheriff-Courts do not entertain any of that class of actions competent in the Supreme Courts of Scotland (such as actions of declarator or reduction), which either affirm or negative the existence of a right, and leave it to some subsequent process to carry the conclusion into effect. The exclusion of these actions seems to rest on usage.

2. *Declarators Incompetent.*—Actions of declarator are therefore incompetent in the Sheriff-Court whatever may be the subject matter with which they deal. It is not merely declarators of marriage, or declarators as to rights in heritable property, which are incompetent; but declarators in regard to rights in moveable property, and other matters with which the Sheriff-Court is otherwise competent enough to deal, are also incompetent. The mere introduction into a summons (otherwise competent) of declaratory expressions, does not, however, render the action incompetent, the declaratory conclusions

 Proving Tenor Incompetent—Reductions Incompetent.

being taken as merely introductory to the proper petitory conclusions. Thus it is competent in an action of removing to insert a declaratory conclusion, that the irritancy on which the removing is to follow has occurred.(a) In the older practice such declaratory findings were frequently asked for, but they are rarely asked for now; and the practice should be avoided, both because it raises questions of competency, and because it is in itself ill adapted to the forms of process now in use.

3. Proving the Tenor Incompetent.—Actions of proving of the tenor, being a species of action of declarator, are also incompetent. Thus, an action to prove the tenor of a lost bill is not competent before the Sheriff-Court.(b) And as an action of proving the tenor of a lost deed must always precede a petitory action founded on the deed, it is impossible to obtain a remedy on a lost deed in the Sheriff-Court. This, however, should not exclude a proper petitory action founded, not upon the lost deed, but upon the consideration for which it was granted, where such a separate action is otherwise competent.

4. Reductions Incompetent.—Actions of reduction are also incompetent in the Sheriff-Court. A Sheriff-Court Judge has no jurisdiction to determine how far a party is entitled to be freed from a written contract,(c) or from the written laws of any society or corporation which he may have joined.(d) The ground upon which reductions are incompetent is broader than that which relates to the incompetence of declarators, for the fact that an action involves a reduction is in general sufficient to prevent the Sheriff from proceeding with it, and his duty is

(a) *Taylor v. Boyle*, 9 March 1824, 2 Shaw's Appeal Cases, 30; *Hall v. Grant*, 19 May 1831, 9 S. 612. It is no objection to a petitory action that a right must substantially be declared before the conclusions can be reached; *Murdoch v. Wyllie*, 8 March 1832, 10 S. 445.

(b) *Carson v. M'Micken*, 14 May 1811.

(c) *Young v. Robertson*, 24 Nov. 1830. 9 S. 59.

(d) *Fleishers of Glasgow v. Watson*, 20 Nov. 1824, 3 S. 305; *Porteous v. The Cordiners of Glasgow*, 11 June 1830, 8 S. 908.

 Competent Remedies : Orders for Payment of Money.

to sist it till a reduction be brought in the Court of Session.(e) Thus, he cannot in general entertain a reductive conclusion as introductory to a petitory conclusion in the way in which he might have entertained a declaratory conclusion.

An important exception from this rule is made by Statute with reference to deeds which are void under any of the Bankruptcy Acts.(f) Such deeds may be set aside in the Sheriff-Court as well as in the Court of Session. This does not make it competent to raise a simple reduction of one of those deeds in the Sheriff-Court. The effect of it is, when a question as to the validity of such a deed is raised by a Sheriff-Court action, to prevent the necessity of sisting the action till the question be determined in the Court of Session, and to allow that question to be determined in the particular action, and for the purposes of that action.(g) The Court having thus jurisdiction to dispose of the matter, it is difficult to conceive how the insertion of a reductive conclusion by way of introduction to the proper petitory conclusions could be fatal to the action. It might be better left out, because no reductive decree could be pronounced, but it could have no effect in rendering incompetent conclusions otherwise competent.(h)

5. Competent Remedies—Orders for Payment of Money.—

The forms of action which are competent are sufficiently numerous. To begin with, there is the ordinary petitory action, concluding for the payment of a definite sum, either at once or at some future time, in one sum or by instalments. The action of count and reckoning concludes for such sum as may be found due after investigation into the accounts between the pursuer and the defender. The action of multiplepinding is brought into Court to have the rights of different competitors to possess or share some fund or moveable property determined.

(e) *M'Laren v. Steele*, 18 Nov. 1857, 20 D. 48.

(f) 19 and 20 Vict. c. 79, § 10; 20 and 21 Vict. c. 19, § 9.

(g) *Dickson v. Murray*, 7 June 1866, 4 Macph. 797.

(h) *Moroney v. Muir*, 5 Nov. 1867, 6 Macph. 7.

Competent Remedies: Orders *ad factum præstandum*—Special Remedies.

Actions of aliment conclude for payment of it for certain periods, more or less extensive. These are the ordinary forms of action in which the payment of money is concerned, and they all commence by summons.

6. Competent Remedies—Orders *ad factum præstandum*.—Actions which require a party to do or to refrain from doing a certain act (*ad factum præstandum*) commence either by summons or by petition, according to circumstances; and in either case may or may not be combined with conclusions for the payment of money. In petitions for interdict, the complainer seeks to have some parties prohibited from doing the acts complained of; and in other forms of action parties may seek to have others enjoined to do certain things. Thus they may seek to have the defender ordained to sign some deed,⁽ⁱ⁾ or to fulfil a contract,^(k) or to stock a farm,^(l) or to deliver up bills or other documents wrongfully withheld.⁽ⁿ⁾

7. Special Remedies.—It is needless to enumerate the kinds of remedy which the Sheriff can give in the cases in which he has by statute or common law a jurisdiction of a special kind. The more important of those cases themselves were enumerated at the end of the last chapter, and it is enough to say here that the Sheriff necessarily gives the remedy appropriate to the jurisdiction, and to delay saying more until those matters come to be treated of in detail.

(i) *Corbett v. Douglas*, 5 March 1808, Hume, 346. This case, and that of *Aberdeen v. Laird*, 7 Feb. 1822, 1 S. 825, show that the deed may relate to heritage, provided the objections to signing it be not such as to raise questions of heritable right.

(k) *Murray v. Pearson*, 11 June 1842, 4 D. 1411. In this particular case the

Court entertained doubt about the action because the defence raised a question of heritable right, but the general competency was admitted.

(l) *Horn v. M'Lean*, 19 Jan. 1880, 8 Shaw, 329.

(n) *Riddell v. Christie*, 20 Nov. 1821, 1 S. 151.

Modes of giving Jurisdiction—Residence.

CHAPTER IV.

OF THE PERSONS OVER WHOM THE SHERIFF-COURT HAS JURISDICTION.

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| <ol style="list-style-type: none"> 1. <i>Modes of giving Jurisdiction.</i> 2. <i>Residence.</i> 3. <i>Carrying on Business in County.</i> 4. <i>Making Contract soluble in County.</i> 5. <i>When thing in dispute situated in County.</i> 6. <i>Possession of Property within County.</i> | <ol style="list-style-type: none"> 7. <i>Exemptions from Jurisdiction—Crown.</i> 8. <i>Former Privileges of College of Justice.</i> 9. <i>Other Claims of Exemption.</i> 10. <i>Of Persons Prorogating the Jurisdiction of a Sheriff.</i> 11. <i>Of Reconvening Parties.</i> |
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1. *Modes of giving Jurisdiction.*—In general, questions of jurisdiction arise only in the case of defenders. Any one, no matter where resident, or whether he be a foreigner or a Scotchman, may stand as pursuer. There are proceedings by which persons not resident in Scotland may be made to find security for expenses, but the right of such persons to apply to the Court, is complete in itself.

With respect to defenders, there are various modes of constituting jurisdiction. The most ordinary ground of jurisdiction over a defender is by reason of his residing within the county (*ratione domicilii*); but we shall also have to consider when parties are liable to the jurisdiction by reason of carrying on business within the county; or by reason of having engaged to do something within the county (*ratione contractus*); or because the thing about which they are disputing is within it (*ratione rei sitæ*); and lastly, to what extent the jurisdictions recognised in Scotland over parties who happen to have property (heritable or moveable) within the territory are applicable to the Sheriff-Courts.

2. *Residence.*—The residence required to give jurisdiction over a defender must not be confounded with domicile. The residence meant is the actual residence which the person has for the time being, whether it be temporary or whether it be

Residence.

permanent. To prevent too much uncertainty as to whether there is jurisdiction or not, the rule has been adopted that the residence is held sufficient to found jurisdiction, if the defender have been there for forty days before citation. But provided the forty days are passed, no other condition is required; and the residence may have been in a friend's house, or in a hotel, or in a common lodging-house; may have been without any intention of remaining, and may have been taken up for the express purpose of founding jurisdiction.(a) Shorter residence than forty days will be sufficient to found jurisdiction if the defender come to the county *animo remanendi*,—for instance, if he take up his house in it. In such a case the jurisdiction begins with the residing,(b) and it continues there although the defender personally may be seldom in the house for more than a few days at a time.(c)

A person is not necessarily limited to one jurisdiction. If a person have a permanent town residence and a permanent country residence, each occupied in turn as it suits, he may be cited at either.(d) But if a person were cited at one of his houses, when reasonable inquiry would have shown that he and his family were then occupying the other, the citation might not be sustained.(e)

Jurisdiction by residence is lost in two ways,—in one way immediately, and in the other way after the lapse of forty days. If a person give up his residence in one county, and go with his furniture and servants, and take up his residence at some known place in another county, jurisdiction over him by residence is transferred at once to the Sheriff of the new county. If, on the other hand, he leave without taking up some other residence in Scotland, his former residence remains for forty days. After that time, if nothing be known to the contrary,

(a) *Joel v. Gill*, 10 June 1859, 21 D. 929; Ersk. 1. 2. 16.

(b) *Home v. Eccles*, 30 July 1725, M. 3704.

(c) *Irvine v. Deuchar*, 13 March 1707, M. 3708.

(d) *Spottiswoode v. Morison*, 15 July 1701, M. 4790.

(e) *Gordon v. Campbell*, 30 Dec. 1702, M. 3702.

Carrying on Business in County.

he is presumed to be out of Scotland, and if citable at all, must be cited edictally.(g)

Persons who have no fixed place of abode must be cited where they can be found. Thus, a person who travelled the country as an emigration agent, was held subject to the jurisdiction of the Sheriff of Inverness upon a personal citation given to him there.(h) Soldiers and sailors are cited at the dwelling-place which they occupy when on shore or at home from duty, even though they have not resided there perhaps for more than a day or two at a time, and even though the house should not belong to the person himself, but to a relative.(i)

Wives are subject to the jurisdiction of their husbands' principal domicile, or possibly, in the event of his having two residences, to the jurisdiction of either of them.(k) But unless the wife be actually with the husband, it would not appear that she would be subject to a jurisdiction under which he had fallen merely by residing forty days within it at some house not his own. The trustees of a deceased party may competently be sued before the Sheriff of the county where the deceased lived, and where the heritable property which they managed was situated, though the majority of their number lived in another county.(l) In the same way it is thought that executors would be liable to the jurisdiction of a county where the deceased lived, where the executors were confirmed, and where the estate was being wound up, though the majority of them should actually be resident without the county.

3. Carrying on Business in County.—Carrying on business in a county and having an office there for that purpose is in some

(g) *Wightman v. Wilson*, 9 Mar. 1868, 20 D. 779; 9 Geo. IV. c. 120, § 53. Edictal citation is done by leaving the citation at the Register Office in Edinburgh, but does not proceed on the Sheriff's warrant.

(h) *M'Niven v. M'Kinnon*, 14 Feb.

1834, 12 S. 453; *Lees v. Parlan*, 12 Nov. 1709, M. 4791.

(i) *Brown v. M'Allan*, 14 Feb. 1845, 7 D. 423.

(k) *Ringer v. Churchhill*, 15 Jan. 1840, 2 D. 307.

(l) *Black v. Dunoon*, 18 Dec. 1827, 6 S. 261.

 Carrying on Business in County.

cases a ground of jurisdiction. With respect to individuals, it is not by itself enough, but along with other circumstances it may be. Thus, a law-agent who resided in Kincardineshire, but carried on business in Glasgow, was held subject to the jurisdiction of the Glasgow Magistrates, in an action requiring him to return certain title-deeds which had been left, and were still lying at his Glasgow office.(n) And in another case, an opinion was expressed that a person carrying on business within a burgh would, though not resident there, be liable (if cited personally) to the jurisdiction of the burgh Magistrates in an action arising from his business.(o)

In the case of a company, even though it be a fictitious one, and consist only of one partner, it is well recognised that the having of a place of business in a county is a sufficient ground of jurisdiction in all actions arising out of business conducted there.(p) This jurisdiction exists at common law, and cannot be taken away by implication. Thus, a statutory enactment requiring a railway company to be cited at its head office does not take away the jurisdiction of the Sheriffs in whose counties it has stations.(q) It is to be remembered that if the office of any company in a county be not the head office, the jurisdiction is limited to causes of action arising within the county. Thus, if a railway company have its head office in Inverness-shire, and branch offices in Elgin and Banff, it is not competent to raise an action against the company in the county of Banff upon a cause of action arising in the county of Elgin.(r)

(n) *Bitchie v. Wilson*, 15 Feb. 1828, 6 S. 552. He had been cited personally.

(o) *Hunter v. Fairweather*, 1 March 1837, 15 S. 693.

(p) *Bishop v. Mersey and Clyde Navigation Steam Company*, 19 Feb. 1830, 8 S. 558. *Young v. Livingstone*, 13 Mar. 1860, 22 D. 983.

(q) *Aberdeen Railway Company v. Ferrier*, 28 Jan. 1854, 16 D. 422. The requirements as to citation must, of course, be complied with. In an unreported

case, Lord Jerviswoode, affirming Sheriff D. M. Smith, held that a clause in a railway Act, that "the domicile of the company, with reference to all judicial proceedings or actions at law, shall be held to be the town of Inverness," did not exclude the jurisdiction of the Sheriff-Court of Elgin.

(r) *Edward v. Inverness and Aberdeen Junction Railway*, 24 April 1862, 4 Irv. 185.

 Making Contracts soluble in County.

Jurisdiction on the ground we have been considering ceases with the dissolution of the company, and does not subsist to the effect of rendering the former partners liable to the jurisdiction.(s)

4. Making Contract soluble in County.—If a person undertake to perform some contract within a county, he is liable to the jurisdiction of the Sheriff, provided he be personally cited. This important ground of jurisdiction, well known in the Supreme Courts, was in some danger of being lost sight of in the Sheriff-Courts; but it has been recently decided to apply to them, and (as has been pointed out by the present Lord President) it is a kind of jurisdiction which it is important that the Judge Ordinary should possess. It has long been recognised that, in some actions, a person must be liable to the jurisdiction when personally cited within the county, as, for instance, in an action of aliment for a child; in an action of restitution of a moveable newly seized by him or hired; or for payment of things newly bought by him for ready money;(t) but it has now been decided that the jurisdiction of the Sheriff-Court upon this ground rests upon the same principles as, and is co-extensive with, that of the Court of Session. It has also been laid down that it is immaterial though the person who has contracted to perform, and who has been cited within the territory of the Sheriff, is a foreigner, since the expression that the Court of Session is the *commune forum* of foreigners applies only to such foreigners as are actually out of Scotland, and who require to be cited edictally.(u)

Jurisdiction founded on this ground, however, warrants only such actions as are necessary for the enforcement of the contract, or as arise directly out of its non-fulfilment. It is not to be taken as warranting all the actions that may arise out of the

(s) *M'Eachern v. M'Pherson*, 3 July 1824, 8 S. 211.

(u) *Pirie v. Warden*, 20 Feb. 1867, 5 Macph. 497.

(t) *Per Lord Mackenzie in Binger v. Churchill*, ante, note (k).

Thing in Dispute situated in County.

contract. For example, if, after the contract has been fulfilled, and the price paid, one of the parties should raise an action of damages, alleging that it had not been fulfilled completely, that action could not be brought in the forum of the *locus solutionis*,(v) even after personal citation, unless there were some other ground of jurisdiction. On the other hand, an action of damages for breach of the contract may be so brought.(x)

5. Thing in Dispute situated in County.—Jurisdiction is also founded in many cases by the fact of the thing about which parties are disputing being within the territory, although the parties themselves should be beyond it. Thus, an action of removing, not containing personal conclusions, is competent within the county in which the subjects lie, though the defender should be beyond it.(y) On the same ground, an action of ejection would also be competent against the person who, though resident in another county, occupied with his goods premises situated within the jurisdiction; and if a person were by himself or his agents wrongly to fail to deliver goods lying within the jurisdiction, it would appear that he might be liable to an action to compel him to make delivery, though he himself should not be within the jurisdiction.(z) As a last illustration of this kind of jurisdiction, may be mentioned the competency of a party bringing a petition for the sale of grain before the Sheriff of the county where it was lying, though the other party interested in it resided in another Sherifffdom, and though an action between the two was going on about it in the Court of Session.(a) All these cases agree in this, that they were

(v) *Logan v. Thomson*, 24 Jan. 1859, 3 Irv. 323.

(x) *Sinclair v. Smith*, 17 July 1860, 22 D. 1475.

(y) *Williamson v. Haigie*, 28 Nov. 1635, M. 4815.

(z) *Per Deas, Scottish Central Railway Company v. Ferguson, Rennie, & Co.*, 30 March 1863, 1 Macph. 750. Although Lord Deas was in the minority in this case, his opinion on this point

is not contradicted by the other judges, and is directly supported by the Lord President.

(a) *Bannatyne v. Nevendorff*, 22 Jan. 1841, 3 D. 429. The action in the Court of Session was about the price of grain; and the petition to the Sheriff-Court was to have the grain sold, and the proceeds consigned, so as to avoid charges for warehousing.

Possession of Property within County, &c.

cases in which parties were disputing about the possession or custody of the property in question.

6. Possession of Property within county.—The possession of heritable property within Scotland is a ground of jurisdiction in the Supreme Court in all kinds of actions, except those relating to status,^(b) but it has not been decided whether that could form a ground of jurisdiction in the Sheriff-Court; and as the jurisdiction is an anomalous one, probably the want of a practice to justify it is decisive against its existence. The possession of moveable property also within Scotland may be made the ground of jurisdiction in the Supreme Court by the process of arrestment *ad jurisdictionem fundandam*. In the case of a foreigner not also personally cited within Scotland, an arrestment of this kind does not found jurisdiction in the Sheriff-Court;^(c) but it has not been decided whether jurisdiction could not be founded in this way against a foreigner who was personally cited within Scotland or within the county. Nor has it been decided whether the process of arrestment *ad fundandam jurisdictionem* can be used to found jurisdiction against a Scotchman domiciled in another county, but having property within the county in question; but the practice is unknown. In one class of cases, namely, maritime cases, where the Sheriff-Court has a statutory jurisdiction over foreigners, the process of arrestment, with the view to founding on it, is in frequent use. In all cases the precept on which the arrestment proceeds, even when the subsequent action is to be brought in the Supreme Court, may be raised in the Sheriff-Court.

7. Exemptions from Jurisdiction—Crown.—The only exemption from the jurisdiction of the Sheriff-Court now of consequence is that of the Crown, which may insist that certain actions shall be brought against it only in the Court of Ex-

(b) *Ferris v. Woodward*, 80 June 1831, 9 S. 864; *Kirkpatrick v. Irvine*, 28 June 1838, 16 S. 1200. (c) *Burn v. Purvis*, 13 Dec. 1828, 7 S. 194. See *supra*, art. 2, note (g)

 Former Privileges of College of Justice.

chequer. Those actions are actions on any matters connected with the Revenue, or with the proceedings of officers of the Revenue, or with certain matters relating thereto, all particularly set forth in the statute erecting the Court of Exchequer.(d) The exemption of the Crown extends to all persons acting in the matters in question under the authority of the Crown.(e) The remedy, should any of the lieges bring or threaten to bring any such action against the Crown or one of its servants in the Sheriff-Court, is for the Crown to apply for an interdict to the Lord Ordinary of the Court of Session appointed to decide in Exchequer causes.(g)

8. Former Privileges of College of Justice.—The members of the College of Justice (which includes the judges, counsel, procurators, and clerks of the Supreme Court) formerly had the privilege of suing certain actions in the Court of Session, which other parties would have been obliged to bring in the Sheriff-Court, and they had also the privilege of declining to be sued in any action before any other than their own Court. Those privileges only served to permit unworthy members of the profession to harass the public. After various invasions, made by the Small Debt and other Acts, both of the privileges were in the end abolished. The privilege which members of the College had as pursuers was abolished by the provision of the Court of Session Act of 1850, which enacted that no member should be entitled to institute any action or proceeding, whether original or by way of review, before the Court of Session which could not have been instituted by him before such Court if he had not been a member.(h) The privilege the members had as defenders was abolished by the Sheriff-Court Act of 1853, which enacted that no person should be exempt from the jurisdiction of the Sheriff-Court in any cause on account of privilege by reason of his being a member of the College of Justice.(i)

 (d) 6 Anne, chap. 26, § 6.

 (e) *Black v. M'Lachlan*, 12 Feb. 1833, 11 S. 378.

(g) 19 and 20 Vict. c. 56, § 14.

(h) 18 and 14 Vict. c. 86, § 17.

(i) 16 and 17 Vict. c. 80, § 48.

Other Claims of Exemption, &c.

9. Other Claims of Exemption.—Various bodies, such as the Commissioners of Supply for counties, and the Magistrates of burghs, which combine somewhat of the functions of a court of law with administrative functions, have asserted claims to be exempt from the jurisdiction of the Sheriff-Courts. In so far as such bodies exercise proper judicial functions, it is clear that their decisions are not liable to the review of the Sheriff-Court. In so far, also, as such bodies act in carrying out statutes, in the exercise of statutory powers, it would appear that they are exempt from the jurisdiction of the Sheriff-Court. But in all cases in which they act as administrators of property, or as corporations, that is, *inter alia*, in all questions of contract or of damages, they are liable to the jurisdiction, just in the same manner as bodies are which have no claim to the character of courts. Thus, the Commissioners of Supply of Lanarkshire were held subject to the jurisdiction of the Sheriff-Court in an action by the Inspector of Weights and Measures for payment of his salary as duly fixed by the Justices of the Peace.^(k) In another case the Magistrates of a burgh were held subject to the Sheriff's jurisdiction in a question between them and a neighbouring proprietor as to his right to erect a fence on the banks of a river.^(l) In similar circumstances the Guildry of a town were held to be subject to the jurisdiction.⁽ⁿ⁾ In contrast to these cases, comes a recent case, in which it was held that the Sheriff could not grant interdict to prevent the carrying out of an order given by a judge of the police court of a burgh in exercise of statutory (though not of judicial) powers.^(o)

10. Of Persons Prorogating the Jurisdiction of a Sheriff.—Certain objections to the jurisdiction of a Sheriff-Court may be

(k) *Lyall v. Lanark Commissioners of Supply*, 5 July 1859, 21 D. 1136. The objection, that the Sheriff was himself one of the Commissioners of Supply, was disregarded.

(l) *Kintore v. Lyall*, 27 Feb. 1802, M. 7673. See also *Lawson v. Magis-*

trates of Edinburgh, 28 Feb. 1581, M. 4811.

(n) *Robertson v. Panton*, 21 Nov. 1823, 2 S. 511.

(o) *Buchanan v. Keating*, 12 Dec. 1854, 17 D. 155.

Of Reconvening Parties.

waived. Those are, objections of a kind personal to the objector. Where the objection to the jurisdiction is such that the proceeding could not be competent against any person whatsoever, the objection cannot be waived. Thus, no consent of parties (other, of course, than that embodied in a submission) could make the Sheriff-Court judge in a question of heritable title, or entitle it to pronounce a decree of declarator; or, where statutory forms must be complied with in order to give jurisdiction, entitle the Court to judge where those forms had not been observed.^(p) But where the proceeding is in itself a competent proceeding in the Sheriff-Court, any objection which a defender could have taken, on the ground of his not being amenable to the jurisdiction, may be waived. In this way, a foreigner, or a person resident in another county, may "prorogate" the jurisdiction of a Sheriff-Court. This may be done either by express consent, or by proceedings implying consent. Express consent may be embodied in a minute, which may be in general terms, and may even be written before the action is raised. Thus, a person may bind himself not to object to the jurisdiction of a particular Sheriff-Court in regard to all actions that might be raised against him about some specified matter.^(q) Consent to the jurisdiction is implied by the mere act of appearing and pleading without stating any objection to it. Even a party who appeared only to state certain objections to the competency of proceedings was held to have waived the objection to jurisdiction, because he did not state it till after he had been defeated in a litigation about the other objections.^(r)

11. Of Reconvening Parties.—Reconvention is the name given to the ground upon which a person who has applied to a court as pursuer or complainer in any action subjects himself as defender to the jurisdiction in all relative proceedings. It has been

(p) *Ersk.* 1. 2. 80; *Forrest v. Harvey*, 25 April 1846, 4 Bell's Appeal Cases, 197.

(r) *White v. Spottiswood*, 30 June 1846, 8 D. 952.

(q) *Longmuir v. Longmuir*, 21 May 1850, 12 D. 926.

Of Reconvening Parties.

said that this jurisdiction is founded on implied consent, and it has been therefore called a kind of prorogated jurisdiction; but it is better at once to say that it is a kind of jurisdiction founded in reason and equity, in order to protect a native defender from the disadvantage to which he might otherwise be put in dealing with the foreign pursuer, by not being able to take any counter proceeding. Difficulty has been felt in defining the extent of this jurisdiction. On the one hand, it has been said that a foreigner who applies to our courts renders himself responsible to every action which the person whom he has sued may think fit to raise against him, whether it be connected with the subject matter of the first action or not. On the other hand, it has been attempted to narrow the jurisdiction so as to make the foreign pursuer liable only in counter actions, strictly so called. Neither of these extreme views is to be taken as correct. The great object of the jurisdiction is to protect the native defender against such disadvantage in dealing with the foreign pursuer as he would not feel in the case of a native pursuer; and the Court must keep this in view. On this ground, it is held that the jurisdiction exists where the claims are either *in eodem negotio* or *ejusdem generis*. Thus, a foreign pursuer raising an action for debt in our Courts, will render himself liable to other actions of debt at the instance of the defender, though they may arise out of different transactions, but he will be liable to actions of damages only when they arise out of the same transaction, or out of some other transaction in the same course of dealing. A foreign pursuer raising an action of debt here will not render himself liable to an action of damages arising out of an entirely different transaction.(s)

The action said to ground jurisdiction by reconvention must be in Court at the time the other action is brought. If the first action have been concluded, and the foreigner be no longer before our Courts, it is too late to bring the counter action.(t) But the action is in time though the merits of the first action may have

(s) *Thomson v. Whitehead*, 25 Jan. 1862, 24 D. 381.

(t) *M'Ewan's Trustees v. Robertson*, 9 March 1852, 15 D. 265.

Of Reconvening Parties.

been disposed of, if it still be in Court on the question of expenses. Thus, a foreigner who had raised and lost an action before the Court of Session was held to be within the jurisdiction whilst the expenses were being audited, and he was made to answer to an action of damages for the oppressive use of arrestments on the dependence of the original action.(u) In ordinary circumstances, the application of the foreigner must clearly precede the application for the native, otherwise there can be no jurisdiction; but if a native first raises an action against a foreigner, and the foreigner, without waiting to state any objection to the jurisdiction, immediately raises a counter action, he will be foreclosed from stating it.(v)

The rules as to reconvention have been developed in the Supreme Court, and there is no experience to tell how far they are applicable to the Sheriff-Courts. It is here necessary to distinguish between two sets of persons liable to be reconvened,—between foreigners not resident in Scotland and persons resident in Scotland but not in the particular Sheriffdom. In the case of foreigners the principles will apply exactly.(x) In the case of persons resident in other Sheriffdoms, the principles do not apply to their full extent. They apply only to the extent of sanctioning counter actions arising out of the same facts. Except in the way of making one inquiry serve, there is nothing to be gained by reconvening such parties, because it is no hardship to make a man sue in one Sheriff-Court instead of in another.

(u) *Baillie v. Hume*, 17 Dec. 1852, 15 D. 267.

(v) *Morison v. Massa*, 8 Dec. 1866, 5 Macph. 130.

(x) There is no difficulty about citing the foreigner, because it is enough to serve the process on his procurator; *Vans v. Sandilands*, 18 Nov. 1765, M. 4840.

Declinature on ground of Relationship.

CHAPTER V.

OF DECLINING THE SHERIFF'S JURISDICTION.

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- 1.
- Declinature on Relationship.*
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- 2.
- Declinature on Interest.*

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- 3.
- Declinature cannot be waived by the Parties.*
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In some cases, though the Court has jurisdiction, objection may be taken to the acting of some particular Sheriff. This is called proponing a declinature, and there are two grounds upon which it may be done, that of relationship to one of the parties, and that of interest in the matter at issue.

1. *Declinature on ground of Relationship.*—Declinature upon the ground of relationship depends upon statute. The Act 1594, c. 216, made it incompetent for any judge of the Court of Session to sit or vote in any action in which a father or brother or son might be pursuer or defender. The Act 1681, c. 13, besides extending the preceding Act to all Courts, extended the degrees forbidden by it to those of affinity, and added as degrees which were to exclude those of uncle and nephew by consanguinity. These statutes enumerate all to whom objection can be taken on the ground of relationship. Attempts to extend the degrees by implication have been discountenanced. Thus, it is no ground of declinature that the judge's wife is sister to the defender's wife,^(a) or that the judge's neice^(b) or grand-neice^(c) is married to one of the parties. These decisions were pronounced upon the ground that the second part of the Act of 1681, excluding uncles and nephews, did not exclude uncles or nephews by affinity. It is not necessary that the relationship should be to the proper pursuer or defender. It is sufficient if it be to any party immediately and directly interested in the suit. Thus the brother-

(a) *Goldie v. Hamilton*, 16 Feb. 1816, F.C.

(b) *Erskine v. Drummond*, 28 June 1787, M. 2418.

(c) *Gordon v. Gordon's Trustees*, 2 March 1866, 4 Macph. 501.

Declinature on the ground of Interest.

in-law of a mandatory (who is interested in the expenses) must be declined.(d) For the same reason, a father-in-law was excluded in a case in which his son-in-law was substitute heir to the claimant of an entailed estate, the right to which was in dispute.(e) And the statute applies though the relative may be suing in some capacity in which he has no personal interest. Thus, where a pursuer was suing for behoof of a statutory Board of Commissioners, his brother was declined, even though the defenders made it clear that he had no personal interest by disclaiming all purpose of holding him personally liable for expenses.(g)

2. Declinature on the ground of Interest.—The objection, that a judge is interested in the matter at issue, does not depend upon statute; and there is occasionally considerable difficulty in ascertaining when the interest is of such a character that the objection ought to be held good or is so shadowy that it may be waived, and the Court have held themselves, in judging of such objections, at liberty to take into view the convenience or inconvenience of sustaining them in the particular case. The interest need not always be pecuniary. For example, if the judge be required as a witness in the cause, he may be declined.(h) This, perhaps, proceeds rather on the ground of inconvenience to the parties than on the supposed interest of the judge. The rule, however, has a wider application. It is not indeed now held that a judge is disqualified by having once been counsel in the cause;(i) but he is still held to be disqualified wherever his interest is of such a kind as reasonably leads to the supposition that he may not proceed to his duty with an unbiassed mind. Thus, if the judge be trustee for one of the parties under a private trust, he is taken to be so much in-

(d) *Campbell v. Campbell*, 26 June 1866, 4 Macph. 867.

(h) *Clark v. Wardlaw*, 15 Jan. 1845, 7 D. 268.

(e) *Shaw Stewart v. Corbet*, 15 May 1821, 1 S. 10.

(i) *King v. Patrick*, 27 Nov. 1841, 4 D. 124.

(g) *Highland Road Commissioners v. Machray*, 25 June 1858, 20 D. 1165.

 Declinature cannot be waived.

terested in it as to be disqualified.(k) But it is not enough to disqualify him that he is one of a numerous body of statutory trustees,(l) or still less that he is one of so large a body as the Commissioners of Supply.(n) Being interested as a proprietor in one of the parishes concerned, was held not to disqualify a judge to decide a question of a pauper's settlement; but this proceeded in part on the ground that the parish was large, and that the disqualification, if sustained, would have applied to nearly the whole bench.(o) It is sufficient interest for a judge to decline that he is a shareholder or partner (not merely as trustee,(p) but in his own right) in a joint-stock company which is pursuing or defending;(q) though in a case where the pecuniary interest of each judge was small and remote, and where sustaining the objection disqualified nearly half the Court, the objection was very reluctantly sustained.(r) This was a case where the judges were interested as partners of a life insurance company, and to prevent the recurrence of such difficulties it has lately been enacted that it is not to be deemed a ground of declinature that a judge is a partner of any joint-stock company carrying on as its sole or principal business the business of life and fire or life assurance.(p) Where the interest is contingent, such as that if the defender's title be held bad the judge's own title to an adjoining property may be challenged, the declinature is repelled.(s)

3. Declinature cannot be waived.—Where there is a good ground for declinature it cannot be waived by the parties. In the case of relationship the objection depends on statute, and

(k) *Martin v Heritors of Kirkealdy*, 23 Jan. 1840, 15 F. 379.

(l) *Blair v. Sampson*, 26 Jan. 1814, 18 F.C. (1814 to 1815), 501.

(n) *The Lord Advocate v. Edinburgh Commissioners of Supply*, 5 June 1861, 28 D. 933.

(o) *Gray v. Foulie*, 5 March 1847, 9 D. 811.

(p) 31 and 32 Vict., c. 100, § 108.

(q) *Aberdeen Town and County Bank v. The Scottish Equitable Insurance Company*, 3 Dec. 1859, 22 D. 162; *Wauchope v. North British Railway*, 17 Dec. 1863, 2 Macph. 833-4.

(r) *Borthwick v. Scottish Widows Fund*, 4 Feb. 1864, 2 Macph. 595.

(s) *Belfrage v. Davidson's Trs.*, 20 June 1862, 24 D. 1132.

Declinature cannot be waived.

the whole proceedings if it be neglected, are under a statutory nullity. At whatever stage the objection may be discovered it must be sustained, and the action commenced anew before another judge.(t) On public grounds the same rule is to be followed where the judge has a disqualifying interest in the suit. Parties are generally so unwilling to state a personal objection to a judge, and it would be so bad an example to allow a judge to decide a question in which he had a pecuniary interest simply because the parties were silent, that no option is left. It is the duty of the judge himself to state the objection; and in most cases this is the way in which the point arises. In the Court of Session it is for the other judges to say whether the grounds of the declinature are good. In the Sheriff-Court, if the Ordinary Sheriff-Substitute decline, the case may be proceeded with by one of the Honorary Sheriffs-Substitute, or, if there be none who can act, by the Sheriff-Depute. In this case, however, it would probably be in the power of the Sheriff-Depute to review the grounds of declinature, and to remit to the Sheriff-Substitute to proceed. If the Sheriff-Depute be disqualified the Sheriff-Substitute may, notwithstanding, act;(u) but the parties lose the benefit of the right of appeal. Should such a case occur as that all the judges of the Sheriff-Court were to decline, the party wishing to proceed might appeal,(v) and the Court of Session would have to decide what course should be followed.

(t) *Ommanny v. Smith*, 13 Feb. 1851; 13 D. 678.

(u) *Wallace v. Colquhoun*, 21 Jan. 1823; 2 S. 139; 1579, c. 84.

(v) The Act 1555, c. 39, providing that no advocacy of causes be taken from the Judge Ordinary, excepts the case of the Sheriff-Principal or the Judge Ordinary being a party.

Business of Ordinary Court.

PART II.
OF THE SHERIFF'S ORDINARY COURT.

CHAPTER I.

OF THE BUSINESS AND SITTINGS OF THE ORDINARY COURT.

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| 1. <i>Business of Ordinary Court.</i> | 4. <i>General Regulating Acts.</i> |
| 2. <i>Ordinary Actions.</i> | 5. <i>Sittings of Ordinary Court.</i> |
| 3. <i>Special Actions.</i> | 6. <i>Rolls of Court and Minute-Books.</i> |

1. *Business of Ordinary Court.*—In ordinary language men speak of the different “Courts” held by the Sheriff—of the Ordinary Court, the Small Debt Court, the Debt Recovery Court, and the Commissary Court. Except when used with respect to the last the language is not strictly correct. The Ordinary, Small Debt, and Debt Recovery Courts, are not three separate Courts: properly speaking they are three branches of one Court; but as they have separate records, separate modes of procedure, and (in most cases) separate times of sitting, the popular distinction is practically the most convenient. It will therefore be followed here.

The business of the Ordinary Court is best described by saying that it comprises all the judicial business which is not specially appropriated to the other Courts; and as the Small Debt Court is concerned only with actions for sums not exceeding the amount of £12; the Debt Recovery Court only with actions for debts, not exceeding £50, and falling under the triennial limitation; and the Commissary Court mainly with executry matters; it will be seen that the business of the Ordinary Court is of a very extensive and varied character.

Ordinary Action—Special Actions—General Regulating Acts.

The proceedings may be conveniently divided into two great classes, the first being devoted to the form of action ordinarily followed, and the second comprising all special forms of action.

2. Ordinary Action.—Under the first class will be taken the ordinary petitory action concluding for payment of a sum of money, which, for shortness, will be called the Ordinary Action. With respect to it both those normal proceedings taken in almost every suit, and those incidental proceedings which special circumstances frequently require, will be considered. It will be convenient to take all these firstly, on the footing that the causes are allowed to proceed to final judgment before the Sheriff-Substitute; and then to consider what remedy, by way of appeal to the Sheriff, a litigant may have. The consideration of what execution against the debtor's person or goods may follow on a decree in an ordinary action, will complete this part of the subject.

3. Special Actions.—Having thus described—as thoroughly as may be—the proceedings in the Ordinary Action, the second class of actions will be taken, and under it all special forms of action will be considered. It will therein be considered how far actions *ad facta præstanda* differ from actions with money conclusions; what actions commence by way of petition, and what peculiarities in their course must be attended to; what actions are to be considered as summary actions; and lastly, all those different forms of proceedings which ask for special remedies or proceed under special statutes. In this class, too, will find their place all those actions, such as count and reckoning and multiplepounding, which, though they may concern money, do not ask for a simple order for payment, but for some more complicated remedy.

4. General Regulating Acts.—The principal general regulations in regard to proceedings in the Ordinary Court are contained in the Act of 1853.(a) Many details, however, are still

(a) 16 and 17 Vict. c. 80.

Sittings of Ordinary Court.

regulated by the Act of Sederunt of 10th July 1839, which is still in observance in so far as not altered by the subsequent Act. The Act of Sederunt was passed after the Act of 1838 (b) had effected various reforms, and was framed by remodelling (so as to bring into harmony with them) the regulations which had been made by the Act of Sederunt of 1825 in consequence of the passing of the Judicature Act. Besides these general regulations, there are Acts of Parliament and Acts of Sederunt regulating special points or proceedings which cannot be noticed here.

5. Sittings of Ordinary Court.—Each Sheriff-Court has three sessions in each year. The first commences on the 15th of January or the first ordinary Court-day thereafter, and continues till the 15th of March. The second session commences on the 3d or 4th of April, and continues till the 31st of July. The third commences on the 1st of October or the first ordinary Court day after it, and continues till the 15th of December.(c)

During session, each Sheriff-Court (excepting Courts held at places where a salaried Sheriff-Substitute does not reside) sits for the despatch of ordinary civil business for such number of days in each week as may be fixed by each Sheriff by a Regulation of Court to be approved of by the Lord President and Lord Justice-Clerk. If these days be insufficient, the Sheriff must from time to time appoint additional Court-days for the purpose of disposing of any arrear.(d)

If there be any arrear of business at the end of the session, the Sheriff ought to appoint additional Court-days for the purpose of clearing it off. Before the termination of each session he must also appoint at least one Court-day during each vacation for the dispatch of all ordinary civil business, including the calling of new causes, and the receipt of all papers which, if the Court had not been in vacation, would have required to have been lodged. Before the Act of 1853, it was not compe-

(b) 1 and 2 Vict. c. 109.

(d) 16 and 17 Vict. c. 80, § 42.

(c) 16 and 17 Vict. c. 80, § 43.

Rolls and Minute-Books.

tent for the Sheriff to sign certain of his interlocutors during vacation, but now all restrictions of that kind have been removed, and the Sheriff may pronounce orders of all kinds as freely during vacation as during session.(e) During vacation those causes which are called summary proceed in the same way as during session.

6. Rolls and Minute-Books.—The practice of the different Courts varies, but it is believed that in general at least two books are kept of the proceedings of the ordinary Court—a motion roll and a minute-book. In the former are entered for each Court-day all the causes which are to be called that day. These may be enrolled either by order of the Sheriff, or by the Sheriff-clerk in the course of his official duty, or by the Sheriff-clerk on the motion of either party. In the two former cases there are no special regulations as to notice of enrolment, but the Sheriff must take care not to put either party to disadvantage. When the cause is enrolled by one of the parties, the notice to be given is fixed by regulation or usage in each Court, but in general the party must give to the clerk and to the opposite party forty-eight hours' notice of the enrolment of an ordinary action, and twenty-four hours' notice in the case of a summary action. The notice must be in writing, and must be delivered at the office of the opposite agent, or posted to him. The notice specifies the purpose of the enrolment; and that sometimes is inserted in the motion roll. For convenience, the motion roll may be classified; keeping new causes, causes for closing records, or other causes, by themselves; and sometimes copies of it are printed and issued to the agents before the Court. The Regulations of the Glasgow Sheriff-Court on these points will be found in the Appendix.(g) The roll itself usually contains a space on which the clerk makes a jotting of the judge's deliverance, to be afterwards extended and signed.

(e) 16 and 17 Vict. c. 80, §§ 44. 45, (g) App. p. xcvi.
and 47, App. p. lxxxviii.

Rolls and Minute-Books.

The minute-book (or "diet-book") contains a memorandum of all important proceedings not entered on the motion roll,—such as short references to interlocutors pronounced by the judges, orders by the judge for regulating the business, memoranda of appearances entered, proofs taken, papers lodged, and of other steps in processes. In some Courts the commendable practice is followed of having a separate book for minuting all decrees. There is also kept in some places a book which is very convenient for the agents, namely, a register of all appearances which have been entered.

The original orders themselves are written on what is called the interlocutor sheet—a paper put up with every cause, and reserved for orders by the judge, or matters specially appointed by statute to be put into it.^(h) It never was the practice in the Sheriff-Court to write the judges' orders in the minutes of the Court. The present practice, however, is somewhat different from the old, under which incidental orders were written on the proceedings to which they referred, and only important orders on the interlocutor sheet.

(h) A. S., 10 July 1839, § 162.

Division of Subject.

CHAPTER II.

ORDINARY ACTION—NORMAL PROCEEDINGS.

SECTIONS.

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| I. THE SUMMONS. | VII. FRAMING RECORD BY CONDESCENDENCE AND DEFENCES. |
| II. THE CITATION. | VIII. PRODUCING AND RECOVERING DOCUMENTS FOUNDED ON IN RECORD. |
| III. ENTERING APPEARANCE. | IX. THE PROOF. |
| IV. DECREE IN ABSENCE AND RESPONDING. | X. THE DEBATE AND DECISION. |
| V. PROTESTATION FOR NOT INSISTING. | XI. EXPENSES. |
| VI. DISCUSSION ON SUMMONS; AND CLOSING RECORD ON MINUTE OF DEFENCE. | |
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The normal proceedings in the ordinary action for the payment of money will form the subject of the present chapter. The consideration of the requirements of the writ of summons by which the defender is to be brought into Court will naturally form the first section. The second section will treat of the mode of serving the writ; and the third, of the mode in which the defender enters appearance to defend the action. The fourth section will consider what the pursuer may do if the defender fail to enter appearance when first called on, and what subsequent opportunity the defender has for supplying the omission. Next, supposing the defender to have entered appearance, and that the pursuer is unwilling to proceed, the fifth section will explain the defender's remedy. The sixth and seventh sections will explain how the record of the parties' written pleadings is to be framed,—whether it be in the short method first introduced by the Statute of 1853, or in the longer method, which is a slightly modified form of the record previously in use. As writings referred to in the pleadings ought to be before the Court, the eighth section will explain what opportunity a party has of tendering them, or of enforcing their production. The ninth section will assume that the parties—one or other—require to submit evidence to the Court, and will show how the proof is to be taken. In the tenth section the debate and decision will be considered; and a sec-

The Summons.

tion devoted to the question of expenses will conclude the view of the ordinary course which is run by the great majority of actions. The various interruptions to which that course is subject, will, according to the plan of the work, be treated of in the following chapter.

Section I.—OF THE SUMMONS.

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| 1. <i>The Introduction.</i> | 6. <i>Conclusion for Expenses.</i> |
| 2. <i>The Pursuer's Designation.</i> | 7. <i>Warrant to Cite.</i> |
| 3. <i>Defender's Designation.</i> | 8. <i>Certification.</i> |
| 4. <i>Conclusion—Demand for Payment.</i> | 9. <i>Precept to Arrest.</i> |
| 5. <i>Statement of Grounds of Action.</i> | 10. <i>Authentication.</i> |

The form of Summons in the ordinary action is given in a Schedule to the Act of 1853. It is a slight modification of the form which has been in use for time immemorial. The writ runs in the name of the Sheriff, and proceeds upon the fiction that the pursuer has appeared before him and made a complaint against the defender, and that thereupon the Sheriff has issued instructions to officers of Court to summon the defender to appear and answer. The summons, taken in detail, consists of the following parts—(1) the introduction; (2) the name and designation of the pursuer; (3) the name and designation of the defender; the conclusion, embracing (4) a statement of the amount claimed and (5) of the ground for claiming it; (6) a demand for expenses; (7) a direction to the officers to cite the defender; and (8) a certification that he will "be held as confessed" if he do not appear. The summons may also contain (9) a precept to arrest on the dependence. It concludes with the date and signature of the Sheriff-clerk, and there may be appended any account referred to in it.

1. *The Introduction.*—The introduction requires no notice. It runs in the name of the Sheriff, designing him by his full title. If the Sheriff be appointed to more than one county the writ should be addressed to the officers of the county for

The Pursuer's Designation.

which it is issued. When the office of Sheriff is vacant, the writ is in name of the Sheriff-Substitute.(a)

2. The Pursuer's Designation.—The pursuer is set forth by name and by designation. The latter need not be that by which he is generally known; it is enough if it serve to point him out, and be correct as applicable to him at the time. Thus, a barrister-at-law was thought to have sufficiently designed himself by saying that he resided at a particular place, although he did not give his usual designation, and though he had resided at the place just long enough to found a jurisdiction as against himself.(b)

The number of pursuers who may sue in one action is not limited, provided they have a community of interest. Thus, two persons who have been injured by the same accident, or who complain of the same slander, may sue for damages in the same summons, provided always that there be separate conclusions for the damages payable to each.(c) These are extreme examples of what is to be taken as community of interest: the pursuers there having nothing more in common than an interest to save expenses, by making one trial serve in place of two. If the acts of which two pursuers complain are different, it does not give them a community of interest that they have both been done by the same defender, because here nothing at all could be gained by having the matters mixed.(d) Indeed the practice of pursuers joining in one action where their interests are separable is in general inconvenient, and is not common.

Certain parties require special care in designation. Wherever parties sue, not as individuals, but in some special capacity, their title must be set forth, as in such a case it forms part of the grounds of action.(e) *Executors* are designed by

(a) 1 and 2 Vict., c. 119, § 4.

(b) *Joel v. Gill*, 23 Nov. 1859, 22 D. 6.

(c) *Revey v. Murdoch*, 11 March 1857, 3 D. 888; *Harkes v. Mowat*, 4 March 1862, 24 D. 703.

(d) *Gibson v. Macquene*, 5 Dec. 1866,

5 Macph. 113.

(e) *Smith v. Stoddart*, 5 July 1850, 12 D. 1185; *Anderson v. Duncan*, 9 Jan. 1861, 23 D. 258.

The Summons.

setting forth their names and residences, and the titles under which they act. They need not confirm to the debt till before extract; but their title, whether it be under testament or decree-dative, must be complete before proceedings are commenced.(f) It is preferable to set forth the names of all the acting executors, but in special circumstances action would be sustained at the instance of a majority.(g) *Trustees* are designed in like manner; and there is no doubt that actions by them may be raised in name either of the quorum fixed by the deed or, if there be no quorum, of the majority of those accepting.(h) A *pupil*, if he has no tutors, raises the summons in his own name,(i) and when it comes into Court a curator *ad litem* is appointed. If a pupil have a tutor, as when his father is living, he cannot carry on an action in his own name. It does not seem essential that the tutor's concurrence be set forth in the summons, though the proper form seems clearly to be that the tutor should not only be designed in the summons, but that he should raise the action as tutor, and conclude for payment to himself in that capacity.(l) A *minor* without curators sues in his own name. If he have curators, he ought to set them forth in the summons as consenting to the action, though doubtless the consent might be given afterwards.(n) A *married woman* sues in her own name, and her husband must concur with her in suing.

When a company is pursuer it is necessary to make a very unmeaning distinction. If the company have what is called a "social" name,—that is, a name made up of that of persons, such as "Jones, Smith & Co.,"—it may sue and be sued by the name of the firm, with the addition always of such reference to its business and office as may serve to point it out. This holds though there be no one of the names of Jones or Smith

(f) *Malcolm v. Dick*, 8 Nov. 1866, 5 Macph. 18.

(g) *M'Laren on Trusts*, vol. i, p. 233, and on *Wills and Succession*, vol. ii, p. 185.

(h) *Blisset's Trustees v. Hope's Trustees*, 7 Feb. 1854, 16 D. 482.

(i) *Fraser on Parent and Child* (edited by Cowan) p. 158. Inhibition and arrestment may be used in the pupil's name.

(l) *Fraser, ut supra*.

(n) *Fraser*, p. 378.

Defenders' Designation.

in the company.(o) If, however, there be what is called a "descriptive" name,—that is, a name not consisting of surnames, such as the Aberdeen Gas Company,—the names of three partners of the company must be joined with it before it can sue.(p) Officials cannot sue in name of the company. Banking companies sue in a particular manner, by their firm and the addition of a registered officer. This is regulated by a special Act of Parliament.(q) Companies incorporated under the Companies Act 1862 sue in the manner specially provided by it, that is, as corporations in their corporate names.(r) Wherever there are special incorporating Acts, these ought to be consulted before framing the summons.

3. Defenders' Designation.—The defenders must be designed in the same way as the pursuers. Care must be taken to give their names and residences as accurately as possible, though trifling inaccuracies of an excusable kind, where there is no doubt about the person intended, will be disregarded. Thus, a defender whose name was William John Munro, but who sometimes signed William Munro, was not allowed to object to a summons in that style.(s) In another case a widow, designed by her residence together with the name and designation of her deceased husband, was not allowed to object that a mistake had been made as to her maiden surname.(t) In a similar case, an objection founded on an error as to the christian name of a married woman was repelled.(u) In all such cases the principle is, that the designation is sufficient if there is no room for doubt as to the person intended. As the pursuer may often not have much knowledge of the defenders' designation, it would be absurd to require anything more from him.

(o) *Wilson v. Ewing*, 20 Jan. 1836, 14 S. 262; *Thomson v. Johnstone*, 3 Nov. 1836, 15 S. 173, and other authorities cited in *Clark on Partnership*, vol. i, p. 542.

(p) *London & Edinburgh Shipping Co.*, 19 June 1841, 3 D. 1045, *Clark on Partnership*, vol. i, p. 540.

(q) 7 Geo. IV., c. 67.

(r) 25 and 26 Vict. c. 89, § 18.

(s) *Guthrie v. Munro*, 27 Feb. 1833 11 S. 465.

(t) *Muir v. Hood*, 10 July 1845, 7 D. 1009.

(u) *Guthrie v. Robertson*, 20 Dec. 1834, 13 S. 234.

The Summons.

Although pursuers are not permitted to join together to sue on separate grounds of action, it is competent to include several defenders on separate grounds, provided the number of six be not exceeded.^(v) This power, however, is very little used (except in actions of removing). It is the remains of a system under which the obtaining of a writ of summons from the Sheriff was a more serious undertaking than at present, and when a pursuer was therefore anxious to include in it everybody against whom he had at the time any claim. The power is not suited to the present forms of pleading. There is no limit to the number of defenders who may be sued on the same ground or grounds of action, as being liable jointly, or jointly and severally, according to the nature of the case.

If the defenders are sued in any special capacity care must be taken to set that forth, and to do so accurately. If it be erroneously set forth the action will be dismissed; even though it should appear that the defenders were liable in some other capacity. Thus, in a case where a person was sued as owner of a certain ship, the action was dismissed on its turning out that he had no share in it, although it was apparent that he was liable for the debt as having had the use and management of the vessel when it was contracted.^(w) The example is probably one of the over anxious application of the rule, but the rule itself is necessary, and the reason is that when defenders are sued in any special capacity, such as that above mentioned, or that of executors, or trustees, the designation in so far truly forms part of the grounds of action.

Executors and trustees, when defenders, are designed in the same way as if they were pursuers. A summons against a pupil is directed not only against him, but also against his tutors nominatim, where they are known, or against tutors and curators

(v) A. S., 10 July 1839, § 9. The limit does not apply to actions of multipointing, mails and duties, pointing of the ground and forthcoming. It is hardly necessary to say that there must be con-

clusions capable of being applied separately to each defender sued; *Barr v. Neilson*, 20 March 1868, 6 Macph. 651.

(w) *Dempster v. Drybrough*, 28 Nov. 1837, 16 S. 109.

Conclusion : Demand for Payment—Statement of Grounds of Action.

generally, if he any has, when he has no known tutors.(x) An action against a minor must be directed also against his curators, naming them if they are known, and if not, designing them generally; but the cases of minors and pupils differ in so far that if the guardians be omitted in the case of a minor they may be called afterwards in the course of the process, while in the case of a pupil they may not.(y) Against married women actions are directed by calling them, and their husbands for their interest.

Companies are sued in the same manner as they sue.

4. Conclusion—Demand for Payment.—The conclusion sets forth that the defender or defenders should be decerned to make payment; and the sum must be definitely stated. Payment may be demanded in one sum or by instalments, according to circumstances, and either at the present or a future date. Everything, however, must be definite. This rule was applied with some strictness in an action of damages, which was dismissed because the pursuers concluded for payment of a sum, to be disposed of “in manner to be mentioned in the course of the process to follow hereon.”(z) If it be intended that the defenders, where there are more than one, should be found liable jointly and severally, that must be specially concluded for, because otherwise the Court will have power only to find them liable jointly.

5. Statement of Grounds of Action.—After the statement of the sum, the conclusion contains a concise statement of the ground or grounds upon which it is demanded. The rule in use before the Act of 1853, as laid down by the Court, was that the summons had to be perfect and complete *ab initio* in everything which was of the essence of the action, whether in the

(x) *Craven v. Elibank's Trustees*, 9 March 1854, 16 D. 811; *Fraser, ut supra*, p. 161.

(y) *Thomson v. Livingston*, 14 Nov. 1863, 2 Macph. 114; *Fraser*, p. 379.

(z) *Mackintosh v. M'Tavish*, 19 June 1828, 6 S. 994.

The Summons.

avermert of what was an essential quality, or of what was a proper ground of action.(a) This rule, not remarkable for its perspicuity, did not differ in substance from the terms of the Act of Sederunt of 1839, which required that the summons should contain a concise and accurate statement of the facts, and should set forth in explicit terms the nature, extent, and grounds of the complaint or cause of action, as well as the conclusions deduced therefrom.(b) The Act of 1853 has so far altered these rules that it is not requisite or proper now for the summons to contain a statement of all the facts in the way they used to be given; but there is no dispensation from the necessity of stating the grounds of action. However briefly they may be stated, still they must be there.(c)

There is a difference in practice in regard to the degree of specification with which the grounds of action are stated. In some Courts it is held that they must be specified with much of the same minuteness which was required under the former practice, but this does not appear to be what was intended. The Act of 1853 speaks of the new forms which it introduces as "short" forms; and it declares that they shall be equally effectual to all intents and purposes as the old forms, and the schedules to the Act give two specimens of what was intended. Thus, a summons of delivery merely calls on the defender "to make delivery to the pursuer of . . . , sold by the defender to him;" and a summons of damages for slander merely calls upon the defender "to pay to the pursuer the sum of . . . , being damages sustained by the pursuer in consequence of the defender having slandered the pursuer by stating" These specimens give little more than what is required to identify the ground of action. The first does not mention the time or place of the sale; and the second does not mention the time or place of the slander, or the names of the persons before whom it was spoken. They are undoubtedly not in such form

(a) *Dallas v. Man*, 14 June 1853, 15 D. 746.

(b) A. S. 10 July 1839, § 10.

(c) *Cameron v. Hamilton*, 1 Feb. 1856, 18 D. 423.

Statement of Grounds of Action.

as would make it always safe to go to proof upon them; but they are in such a form as to enable the defender to state the ground of his defence, and then the Sheriff should judge whether, before going to proof, more specification is required or no. This seems the correct view; but as it is not always taken, a practitioner, where he is certain that he has the means for doing so accurately, will do well to specify the grounds of action somewhat more fully; and where he does so within moderate bounds, and without diverging into narrative, no fault can be found; and by thus acting he may often save the necessity for a condescendence. The danger of doing so is that if he state anything inaccurately, the mistake cannot be cured without an amendment of the libel.

What is a complete statement of the ground of action must depend greatly on the nature of the case. An action upon an account is completely libelled by referring to it by the date of its commencement and of its termination, and annexing it. An action upon a bill or other written document or contract is libelled by setting forth the name of the document, the names of the parties to it, and its date or dates. Where the action is to be laid not only upon the contract, but upon the debt constituted by it, the latter should be specially set forth, as it forms a different ground of action. It is often difficult to distinguish between mere details of proof and what forms part of the grounds of action. Wherever some matter must invariably be proved or admitted before the pursuer can succeed in any action of the kind, the statement of that may be taken as forming part of the grounds of action, while the details as to how it came about in the individual case may be rejected. Thus, if it appeared that a slander was pronounced in such circumstances that the defender could in no case be made liable for it unless he spoke maliciously and without probable cause, the summons must set forth malice and want of probable cause.^(d) It is impossible to go farther into this matter, because to do so would be to go over every possible sort of claim. The pursuer must

(d) See *Cameron v. Hamilton*, *supra*.

The Summons.

always take care that he sets forth enough both to make his summons relevant as it stands, and to give him a basis for going afterwards into farther details if requisite. If the summons be incomplete, the pursuer must then take into consideration whether the requisite changes on, or additions to, the grounds of action may not be made in the condescendence, or in an amendment of the libel.

Where a sum is due in virtue of some special Act of Parliament, the Act must be set forth. This does not mean that Acts changing or adding to the common law must be recited. It applies to sums due to persons under Local and Personal Acts, and to penalties incurred under Public Acts.^(e) It seems unnecessary (though advisable) to insert a continuing Act in the summons.^(g)

6. Conclusion for Expenses.—The conclusion for expenses is very briefly stated, and its terms require no special notice. It is always well to insert it, for although expenses may be awarded in a litigated case without being concluded for, it is doubtful whether they would be awarded in a decree in absence.^(h)

7. Warrant to Cite.—The next portion of the summons is the direction to cite. It names the place for the defender comparing; and calls upon him to appear upon the sixth day next after date of citation. It then goes on to say that he is to appear in the hour of cause and with continuation of days. These words have remained from former styles, and, though now meaningless, were once necessary to prevent the action from falling by the case not having been proceeded with on the first Court-day; and, as they are in the statutory schedule, they must be taken as still necessary. The rules in the Acts of Sederunt as to not issuing summonses with the day of appearance blank have now no application.

^(e) *Glasgow, Airdrie, &c., Railway v. Tennent*, 7 Dec. 1848, 11 D. 212; *Munro v. Munro*, 31 Jan. 1845, 7 D. 358.

^(g) *Rankine v. Brown*, 24 Feb. 1858, 20 D. 672.

^(h) *Heggie v. Stark*, 1 March 1826, 4 S. 510; 1592, c. 144.

 Certification—Precept to Arrest—Authentication.

8. Certification.—The “certification [to the defender] in case of failure [to appear] of being held as confessed,” is the legal mode of making it plain to him that if he does not enter appearance the pursuer will obtain, by merely asking for it, judgment against him, which, after certain additional steps, will become final if he do not take the proper means of being heard against it.

9. Precept to Arrest.—The precept to arrest is conceived in very simple terms. It authorises the officers of Court to arrest in security the defender’s goods, monies, debts, and effects. The purpose it serves will be treated of in the following chapter.

10. Authentication.—After attending to the substance of the summons, the formal parts of it must be attended to. The sums concluded for must be marked in figures on the margin, the true date of signing must be filled up, and it must be signed upon each page by the clerk. After thus being signed and issued the summons is complete, with the exception that the name of the pursuer’s procurator must be marked on the back.⁽ⁱ⁾ It is not necessary that an account annexed to the summons should be signed by the clerk.^(k)

A summons, being a writ of the Court, any erasure or other serious defect in an essential part of it will be fatal.^(l) But the rules as to the authentication of the summons, not being rules enacting new solemnities, but being codifications of the older practice, are not to be taken as imperative, and are therefore not to be applied so as to throw out the writ where they have been substantially complied with, and where everything has been done that is requisite to show that the writ is authentic and unobjectionable in all essential points.⁽ⁿ⁾

(i) A. S. 10 July 1839, §§ 8 and 10, App. xlv.

(k) *Cunningham v. Milroy*, 22 March 1865, 3 Macph. 733.

(l) *Taylor v. Malcolm*, 5 March 1829, 7 S. 547.

(n) *Robinson v. Wittenberg*, 15 Dec. 1860, 23 D. 181.

 The Citation.

Section II.—OF THE CITATION.

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| 1. <i>How Service made.</i>
2. <i>Personal Service.</i>
3. <i>Service at Dwelling-house.</i>
4. <i>Keyhole Service.</i>
5. <i>Service beyond County.</i>
6. <i>Time of Service.</i>
7. <i>Special Rules in Special Cases.</i> | 8. <i>Equivalents to Service not admitted.</i>
9. <i>Accepting Service.</i>
10. <i>Schedule of Citation and Service Copy.</i>
11. <i>Execution of Citation.</i> |
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1. How Service Made:—The summons after being signed by the Sheriff-Clerk is returned to the pursuer and is served on the defender by one of the Sheriff-officers.(o) The service is made in presence of a witness,(p) who must be a male above the age of fourteen.(q) The particular officer may be selected by the pursuer, but must not be interested in the suit.(r) The witness may or may not be connected with the officer. At the time of service the officer must have the original writ in his possession. If required he must exhibit it to the defender, but he is not bound to exhibit it to any other party.(s) There are commonly three modes in which the officer (being duly provided with the writ and accompanied by the witness) may serve the summons. These three are—(1) personally; (2) at the dwelling-place when admittance is obtained; and (3) at the dwelling-place when admittance is not obtained.

2. Personal Service.—Personal Service may take place wherever the defender happens to be found,—in the street, or in a place of business, or elsewhere, as the case may be. It is the best of all kinds of service, as it saves all question as to whether

(o) It does not appear to be quite clear whether an officer of the Court of Session (messenger-at-arms) may not also effect the service (see *supra*, p. 10; *Cheyne v. M'Gungle*, 19 July 1860, 22 D. 1490). As pointed out in Campbell on the Law of Citation, all the statutory forms are directed to officers of the Sheriff-Court.

(p) 1 and 2 Vict. c. 119, § 23 (App. xxvii). Formerly, two witnesses were required.

(q) *Davidson v. Charteris*, 12 Dec. 1788, M. 16,899.

(r) *Dalgleish v. Scott*, 18 June 1822, 1 S. 544.

(s) *Lermont*, 11 July 1699, M. 8096.

Service at Dwelling-house.

the defender actually got notice, and as in certain cases it forms an element in support of the jurisdiction.(t) The officer must tender to the defender a copy of the writ, along with a notice telling him when and where to appear, called the schedule of citation. The service is complete when this tender has been made, and cannot be defeated by the defender refusing to receive the documents.(u)

3. Service at Dwelling-house.—Service at the dwelling-house is not authorised unless the defenders cannot be personally apprehended;(v) but this provision has been somewhat laxly interpreted, and in practice personal service is not insisted on wherever the officer has not seen the defender in going to look for him at his principal dwelling place. Service at the dwelling place begins by the officer making inquiry there for the defender. If the door is opened to him he must ask for the defender, and must make a point of seeing him if he is within and admittance to him is not refused, or rendered impracticable by sickness. If he be refused admittance to see the defender, he is not to use force or threats to obtain it, but he must not stop for less than a refusal. A service was once held bad when the officer had desisted from attempting to see the defender, on being told (in the morning) that he was not yet up.(x) If the defender be not in the house, or if admittance be refused or be impracticable, the officer may then leave the copy of the writ, with the schedule of citation, with the defender's wife, or with one of his servants. The fact of the person receiving the documents excludes inquiry into the fact whether he or she was a servant or not, the person having by receiving them acted in that capacity.(y) If the servants will not take the documents they are affixed to the door.

(t) See *ante*, p. 26.

(u) *Stair*, iv, 88, 15. The fact of refusal ought to be mentioned in the execution.

(v) 1540, c. 75.

(x) *Bruce v. Hall*, 13 July 1708, M 3696. The defender was not living at his usual dwelling-place, which made the case against the service all the stronger.

(y) *A. v B.*, 28 Jan. 1834, 12 S. 347.

The Citation.

In any question as to whether the place of service was or was not the defender's dwelling place, the same rules apply as those formerly considered in regard to the question of what was to be taken as his dwelling-place, with a view to founding jurisdiction.(z)

4. Keyhole Service.—When the officer cannot obtain admittance to the dwelling-house, his duty is to give six audible knocks, and then to affix the schedule and relative copy of the writ to the door. This is commonly done by stuffing them into the keyhole, from which this somewhat extraordinary mode of serving a writ has come to be known as a keyhole citation.

5. Service beyond County.—The summons of itself is authority for service within the county only; but it is a simple matter to make it good for service in another county. If a defender (who, it is presumed, is amenable to the jurisdiction), requires to be cited in another county, the summons is indorsed by the Sheriff-Clerk of that county. This proceeding was introduced in 1838, (a) and has superseded the old method, which was by using "Letters of Supplement," obtained from the Court of Session. The old theory was that the Sheriff's authority, under which the service nominally proceeded, was good only within his own county, and that before it could be made good in another county it required to be supplemented by the authority of the Supreme Court. The new practice is the form which has remained after the substance is gone, and has no other purpose than that of giving to the officer the assurance of a higher functionary that the writ he is serving is the genuine writ of another Sheriffdom. There are no means of making the Sheriff's writ available beyond the kingdom. It has sometimes been said that authority for edictal citation might be obtained from the Bill Chamber of the Court of Session on a Sheriff-Court sum-

(z) *Baillie v. Mensies*, 22 Dec. 1710, M. 8704; *Caldar v. Wood*, 19 Jan. 1798, M. App. "Execution" No. 1.

(a) 1 and 2 Vict. c. 119, § 24. Appx. xxvii.

Time of Service—Special Rules for Service in Special Cases.

mons, but such a proceeding is in practice unknown, and is contrary to the best received opinion.(b)

6. Time of Service.—Service may be made at any *hour* of the day or even of the night. At least, so it is said.(c) But great difficulty would now be felt in sustaining a service—more particularly if it were not a personal service—given at any extraordinary hour, unless under some special circumstances. The *day* on which citation is given must not be a Sunday.(d) There does not appear to be any fixed period after the issue of the summons within which the citation must be given. There is an Act of Sederunt saying that summonses are to be served within a year and day “of the signeting,” but this expression plainly applies only to summonses in the Court of Session.(e) There is no similar rule with regard to Sheriff-Court summonses; but as there is a sort of understanding that there is, it would be unadvisable to use proceedings on a summons which had been longer issued. The provision in the Act of 1853, as to causes in which neither of the parties moves for three months standing dismissed, seems inapplicable, as an unserved writ can hardly be called a cause.(g)

7. Special Rules for Service in Special Cases.—Minors and pupils themselves are cited in the same way as ordinary defenders; and so are their tutors or curators, when they are named in the summons. When their tutors and curators are called generally (that is, without being individually named), the form is gone through of citing them at the market cross of the head burgh of the shire within which the pupil or minor resides.(h)

(b) See *Ante*, p. 24, note (g).

(c) See Campbell on Citations, p. 65.

(d) *Oliphant v. Douglas*, 8 Feb. 1663, M. 15,002.

(e) A. S. 8 July 1831. It appears to have been intended that the provision should extend to the Sheriff-Courts.

(g) 16 and 17 Vict. c. 80, § 15. Appx. lxxvii.

(h) Fraser on Parent and Child, (by Cowan) pp. 154 and 274, and the cases there cited. The law has been altered as to the Court of Session by 13 and 14 Vict. c. 36. § 22, and the terms of this are so broad that doubts may be entertained whether they do not extend to the Sheriff-Court. See also Campbell on Citation, pp. 48 and 365.

The Citation.

Service upon a company is given at their place of business. It may be done by giving the service copy and schedule to one of the partners, or to a clerk found there.⁽ⁱ⁾ It is not however necessary that it should be at the principal place of business. It is sufficient if it be the branch at which the business in question has been conducted; ^(k) unless, indeed, where there be anything (which the pursuer ought to know) in the special contract of copartnership, or elsewhere, requiring citation to be given at the head office. If individual partners are called along with the company they must be cited in the same way as other individuals. Corporations are cited by delivering a copy to the Preses when the body has met for deliberation, or by giving a copy to each of the office-bearers.^(l) Railway and other statutory companies frequently have special clauses in their Acts of Parliament as to the mode of citation, and to these it is necessary to attend. Companies registered under the Companies Act 1862 may be cited through the post, by sending the copy writ and schedule addressed to the Company at their registered office.⁽ⁿ⁾

8. Equivalents to Service not Admitted.—The requisites of citation being statutory, they must be literally obeyed, unless the defender agree to waive them. Thus, things that are equivalent, or which might even be supposed to be better than the statutory regulations, will not be admitted. It will not, for example, be sufficient citation to give the service copy and schedule to the wife when not in her husband's house, ^(o) or to a partner of a company found upon the street, or to leave them for an individual at his shop or counting-house instead of his dwelling-place, ^(p) though all these things might be thought more rational than some of the modes of service which are recognised.

(i) *Wordie v. M'Donald*, 15 Dec. 1831,
10 S. 142.

(k) *Young v. Livingstone*, 13 March
1860, 22 D. 983.

(l) *Per curiam in Dalrymple v. Bertram*, 23 June 1762, M. 762.

(n) 25 and 26 Vict. c. 89, § 62.

(o) *Cassils v. Roxburgh*, 11 Dec. 1769,
M. 3695.

(p) *Sharp v. Garden*, 21 Feb. 1822,
1 S. 374.

 Accepting Service—Schedule of Citation and Service Copy, &c.

9. Accepting Service.—The defender may, however, waive all objections to citation, and he is held to do this when he appears and pleads without stating the objection in *initio litis*.(q) He may also dispense with citation altogether. This is done by writing on the summons what is called an acceptance of service. This says that service of the summons is accepted by the defender, and is signed by him or his agent. In the Court of Session it is customary for an agent accepting service to produce a mandate specially authorising him to do so. This rule is not acted on in the Sheriff-Court; though, of course, a mandate would have to be produced were the pursuer to ask for it.

10. Schedule of Citation and Service Copy.—The schedule of citation is the partly written and partly printed document which the officer delivers to or leaves for the defender. In form it is a memorandum of the message which the officer is supposed to deliver verbally to him.(r) It is signed by the officer only. Along with this, in all ordinary actions, the messenger delivers a copy of the summons,(s) signed by him on each page.(t) The name of the pursuer's procurator must be marked on the back of the copy and on the schedule.(u) If there be more defenders than one, each gets a schedule of citation, and a copy either of the whole summons or of so much of it as concerns himself. It is not necessary to serve copies of accounts referred to in the summons.(v)

11. Execution of Citation.—The execution of citation is the docquet which the officer annexes to the summons after service. It must set forth the mode in which the citation has been given, whether personally or whether at the dwelling-place, with

(q) *Hamilton v. Monkland Co.*, 19 March 1863, 1 Macph. 672.

(r) The Act of 1853 shortened the form of the execution returned on the summons, but the schedule of citation remains in the form previously in use.

(s) The copy stops at the formal part commencing "My will is."

(t) A. S. 1839, § 18.

(u) A. S. 1839, § 19.

(v) *Cunningham v. Milroy*, 22 March 1865, 3 Macph. 733.

 Entering Appearance.

or without access.(x) It is not usual, however, to set this forth in detail, as, for example, to give the name of a servant with whom the copy was left. The execution is signed by the officer and the witness. When complete, it is held to be *prima facie* evidence of the truth of what it sets forth; and so far is this rule carried, that it is not competent to challenge the execution of citation on any ground not patent on examining it, without, in the Court of Session, bringing an action to reduce it.(y) In the Sheriff-Court, where actions of reduction are unknown, the challenge may be made by what are called "articles of improbation," for which special provision is made.(z) These, of course, are unnecessary where the ground of objection is patent. Although the defender is thus restricted in attacking the execution, the pursuer is left at liberty to have it amended. If the service itself has been all in order, the officer may write out a new execution in proper form on its turning out that the first one has been defective.

 Section III.—OF ENTERING APPEARANCE.

 1. *How Appearance Entered.*

 2. *Appearing after Proper Period.*

 3. *Withdrawing Appearance.*

1. *How Appearance Entered.*—The style of the summons which calls on the defender to appear personally in Court upon the sixth day after the date of citation, in the hour of cause, with continuation of days, is a repetition of the older style, and does not represent what the defender has now to do in order to enter appearance to defend the action. He now lodges with the Sheriff-clerk, before the expiry of the six days (called the *induciae*), a notice of appearance in the form prescribed by the Act of 1853. This notice simply sets forth that he enters ap-

 (x) A. S. 1839. § 15, Appx. xlv.

(y) Erakine, iv, 2, 5; Stair, iv, 42, 12.

(z) A. S. 1839, § 91. Appx. lvii.

 Dickson on Evidence. §§ 1243, 1246;
Wallace v. Lochhead, 8 Scot. Law Mag.

Entering Appearance after proper Period—Withdrawing Appearance.

pearance to defend the action, and is signed by himself or his agent.

2. Entering Appearance after Proper Period.—It is not certain whether a notice of appearance can be received after the expiry of the sixth day. The question cannot arise if decree have been taken in absence, for the defender proceeds in that case by way of reponing note. But where decree has not been pronounced, the defender cannot well ask to be reponed; and it has not been left quite clear what step is open to him. The practice varies. In some Courts the defender is not allowed to appear on any terms in the interval between the expiry of the sixth day after citation and the time when it may please the pursuer to move for decree as in absence.^(a) In other Courts the defender is allowed to appear at any time after the expiry of the six days before decree in absence is actually pronounced on obtaining special leave from the Sheriff, which is granted on such conditions as to the expenses which the late appearance may have occasioned, as may be thought right.^(b) The latter appears the preferable course. It is a waste of time and expense to insist upon the necessity of having a decree pronounced in order that it may immediately be recalled. Of course if the Legislature have positively required such an absurdity, the Courts must submit; but there does not seem to be any such necessity. The words of the second section of the Act 1853, which are thought to require it, deal with what the Sheriff is to do if appearance be not entered within the six days, but they do not say that the Sheriff must pronounce decree in absence. All that they say is that he may, which leaves it clear that he also may not, and may therefore follow the other course, which is certainly more consistent with the ends of justice. This course is also more in accordance with the practice before 1853.

3. Withdrawing Appearance.—A defender who has entered

(a) *Corless v. Maver*, 1866, 5 Scottish Law Magazine, 68.

(b) *Steven v. Carnegie*, 14 July 1865, 4 Scottish Law Magazine, 115.

Decree in Absence and Reponing.

appearance is allowed to withdraw it so long as he has not stated his defence, and he is then held to be in the same position as if he had never appeared. Stating his defence to the effect of preventing this, must mean stating it in writing; that is, either signing the minute which the judge makes of the defence when the record is closed in the short form, or giving in defences when the full record has been ordered. There is no authority for holding that a verbal statement of the defence would preclude the defender from withdrawing his appearance. The mode of withdrawal may be either by an express minute, or simply by the defender failing to appear personally, or by an agent when the cause is regularly called in Court. Where the defender withdraws his notice of appearance, and the pursuer acquiesces and gets decree in absence pronounced, the pursuer cannot afterwards say that the withdrawing of the appearance was done irregularly, or object to the defender being reponed against the decree as against an ordinary decree in absence.(c)

SECTION IV.—OF DECREE IN ABSENCE AND REPONING.

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| <ol style="list-style-type: none"> 1. <i>Nature of Decrees in Absence.</i> 2. <i>When Competent.</i> 3. <i>When Pronounceable after Appearance Entered.</i> | <ol style="list-style-type: none"> 4. <i>Form of Decrees.</i> 5. <i>Reponing against Decrees in Absence.</i> 6. <i>What Implement prevents reponing.</i> |
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1. **Nature of Decree in Absence.**—A decree in absence is the decree which is pronounced when the defender does not intend to state any defence, or when he delays to do so; and in the latter case it forms a means of compelling him to make his appearance. As no one can tell at first whether the failure to appear has been because the defender has had no defence or because he has wanted delay, the utmost facilities are given for having the decree recalled. That is done—so long as the

(c) *Gray v. Low*, 22 February 1856, 18 D. 628, and see articles *infra* on the competency of pronouncing decrees in absence and decrees by default.

When Competent.

decree is not "implemented"—by a proceeding (called reponing) under which the defender consigns the expenses already incurred, and then obtains leave to plead. If the defender allows the decree to become implemented (that is, fulfilled in part or in whole, which can only be after due notice), the difficulty of getting leave to plead, in so far at all events as concerns the implemented part, is greatly increased, and application to the Court of Session is required.

2. When Competent.—If appearance be not entered, decree in absence may be taken by the pursuer at any Court on which he chooses to enrol the case after the expiry of the *induciae*. should decree in absence happen to be pronounced before the expiry of the *induciae*, it is null, and the defender is reponed without being required to consign expenses, as in the case of reponing against a regular decree in absence.(d) It is a question how long it remains in the power of the pursuer to take decree in absence after the expiry of the *induciae*. If he bring the cause into Court by enrolling it, he would require to take some step within the period of three months, fixed by the Act of 1853 as that within which a party must move under pain of his action standing dismissed. This seems clear. But if he do not bring the action before the Court, it is doubtful if this provision would be applicable, and it has been said that the pursuer may thus wait for a year and day from the date of citation, according to the old practice, before forfeiting his right to ask decree. The question turns on the meaning of the word "cause" used in the section of the Act, and whether a summons that has been served but not called falls under that denomination. The author thinks that it does. For all ordinary purposes(e) an action is held to begin with service, and a cause seems just an action that has begun, and in which either party has power to move.

(d) *Downie v. Peebles*, 27 Nov. 1841, 4 D. 117.

(e) *Swan v. Mackintosh*, 14 March 1867, 5 Macph. 579. The question

arose on a statute saying that "all civil causes, &c., shall be commenced within" a certain time.

Decree in Absence and Reponing.

3. When Pronounceable after Appearance Entered.—Even after appearance has been entered, decree in absence may be taken if the defender fail to attend when the case is enrolled. The Statute of 1853 seems indeed to contemplate that decrees in absence were to be pronounced only where appearance had not been entered; and that after that had been done the pursuer's remedy, if the defender failed to support his appearance, was to be by decree by default—which would materially increase the defender's difficulty in being reponed. But the Act not having expressly altered the old rule of the common law, which allowed the defender to fall from his appearance so long as he had not stated his defence, it remains in force. If the defender, however, appear on the enrolment, and his defence is minuted, or an order is pronounced for condescendence and defences to be lodged, decree in absence will not afterwards be pronounced. If the defence have been minuted, the common law would hold a decree pronounced in case of the defender not going on with his defence to be a decree by default; and if an order on the defender to lodge defences have been pronounced, the Statute of 1853 specially authorises decree by default on the pleading not being duly lodged. If the diet were adjourned at the first enrolment, and the defender were to fail to appear at the continued diet, the pursuer still could not ask for more than decree in absence.(g)

4. Form of Decree.—A decree in absence usually bears to have been pronounced in that way, although the omission of that would not alter its character. It is always a decree in terms of the conclusions of the libel, unless the pursuer (by minute) have restricted his claim to less.

When the pursuer takes decree in absence, he ought to ask for expenses, which will be included as a matter of course. These expenses are generally taxed at once, and the whole matter disposed of in one interlocutor. Where the pursuer has

(g) *Marjoribanks v. Borthwick*, 18 Feb. 1857, 19 D. 474; 16 and 17 Vict. c. 80, §§ 2 and 6; Appx. lxxii.

Reponing against Decree in Absence.

omitted to ask for expenses, it has been held that he may come back and ask for them so long as the first decree was not extracted.^(h)

5. Reponing against Decree in Absence.—There are two situations in which a defender may have occasion to ask to be reponed against a decree in absence,—firstly, when the decree has been pronounced, no appearance having been entered; and secondly, when it has been pronounced, appearance having been entered but afterwards withdrawn or abandoned.

The second section of the Act of 1853 provides the form to be followed when no appearance has been entered. In that case, the Act provides that the defender may be reponed against the decree, whether it has been extracted or not, at any time before implement has followed upon it, or thereafter against such part of it as may not have been implemented. (What is implement in whole or in part will be considered presently.) The defender is to present a note in the form prescribed by the statute, and to consign therewith any expenses that may have been decerned for. A copy of this note must, at the same time, be delivered, or transmitted through the post-office to the pursuer or his agent in the action. The statute then declares that a certificate by the Sheriff-Clerk, purporting that the note has been lodged, shall operate as a sist of diligence. It does not say that this certificate must be intimated to the pursuer; but, as the sist under the form in use before 1853 was of no avail until it had been so intimated,⁽ⁱ⁾ it would seem advisable still to do so; and this is easily done by having the certificate written upon the copy of the note sent to the pursuer or his agent. When the reponing note has been lodged, and consignment has been made, the Sheriff is directed to pronounce judgment reponing the defender. The object being to keep pursuers from snatching final judgments before the merits of

(h) *Williamson v. Williamson*, 27 1839, § 115, *Anderson v. Anderson*, 6 Jan. 1860, 22 D. 599. June 1855, 17 D. 804; and see *Gray v.*

(i) 1 and 2 Vict. c. 119, § 18; A. S. *Low*, quoted *supra*, p. 62, note (c).

Decree in Absence and Reponing.

their cases have been examined, no discretion is left to him in the matter; but where it has been asked, or there is otherwise ground to suspect its necessity, it does not seem incompetent to allow the pursuer an opportunity of showing cause why the defender should not be reponed. In the judgment reponing, the Sheriff is to appoint the consigned money to be paid over to the pursuer, unless there appear special cause to the contrary. If expenses have been incurred by the pursuer subsequent to the date of the decree (for instance in taking any step towards diligence) prior to the application to be reponed, the Sheriff may decern for those expenses, or for such part thereof as may appear to him to be just. After reponing, the action proceeds in the same manner in all respects as if appearance had been made.

The benefit of the mode of reponing provided by the Act of 1853 appears to have been limited to the case of the decree having been pronounced before appearance has been entered. Probably this restriction was unintentional; and it is not practically important, because there are comparatively few cases where decree in absence is pronounced after appearance has been entered. If it were possible to hold the words in the Act of 1853 as to appearance not having been entered, as including the case of appearance having been entered but afterwards withdrawn or abandoned, the form would suit all cases, and this no doubt would be the sensible reading. If a narrower reading be taken, then the form for reponing prior to 1853 may be used, and there would at all events be safety in that course. The principal differences are, that the defender applies by petition instead of by note; that part implement prevents reponing altogether, and not merely as to the part that has been implemented; and that there is an express direction to intimate the sist to the pursuer.(k)

6. What Implement prevents Reponing.—Implement of a decree having an important effect in preventing reponing, it is of

(k) See note (f), page 65.

What Implement prevents Reponing.

consequence to inquire what it means. That will best be shown by taking the cases in which it is held to happen. A decree is implemented when a pointing has taken place under it, whether the pointing have been reported to the Clerk of Court, or whether or not a warrant to sell the pointed effects have been granted or not.^(l) It is also implemented when the person of the debtor has been incarcerated under it.⁽ⁿ⁾ In short, it has been implemented whenever the property or person of the debtor have been taken in execution of the debt.

It is not altogether plain what is the meaning of being reponed, after part implement, against such part of the decree as has not been implemented. If there have been a payment to account of the debt, or if an instalment have been paid under a decree (such as one for aliment) payable by instalments, it may safely be assumed that the defender may be reponed to the effect of disputing his liability for further payments. But if there have been imprisonment, can the defender be reponed to the effect of preventing a pointing? and *vice versa*; or if there have been a pointing which will not produce more than part payment, can he be reponed to the effect of preventing farther diligence? The decisions already pronounced throw little light on these questions, for they turned on clauses which either expressly said, or which the Courts understood to say, that implement in part altogether excluded reponing. Still they show what "part implement" means, and as it is difficult to suppose that anything can be whole implement of a decree for payment except payment in full, it is probable that such a meaning will be given to the clause saying that the defender may be reponed against the part of the decree which has not been implemented, as will prevent the use of farther diligence than that which has begun.

(l) *Stephenson v. Dobbins*, 17 Feb. 1852, 14 D. 510; *Anderson*, quoted in preceding note (both decided on the Act of 1838); *Rowan v. Mercer*, 12 May 1863, 4 Irv. 377 (decided on the Small-Debt Act).
 (n) *MacLachlan v. Rutherford*, 10 June 1854, 16 D. 937.

Of Protestation for not Insisting.

Section V.—OF PROTESTATION FOR NOT INSISTING.

“Protestation for not insisting” is the name given to the remedy which a defender has against a pursuer who has served a summons on him but neglects to go on with it; and the effect is to oblige the pursuer either to go on with the action or to abandon it. On the first Court-day after appearance has been entered, the clerk puts the case to the roll in order that parties may be heard on the grounds of action and nature of the defence. Should the pursuer fail to be present, the defender may, provided the *induciae* have expired, “put up protestation against him for not insisting.” The form for doing this is regulated by chapter six of the Act of Sederunt of 1839.(o) The defender produces his copy of the summons, and, on the pursuer failing to appear and insist, craves protestation. The Sheriff thereupon admits it, and modifies what is called the protestation money, which is a sum awarded to the defender to remunerate him for his trouble and expense. The protestation cannot be extracted till the expiry of seven free days after the day on which it was granted—unless in the case of arrestments having been used, when it may be extracted on the lapse of forty-eight hours. So long as the protestation is not extracted the pursuer may appear and insist in the action, on payment or tender of the protestation money. If the pursuer allow the protestation to be extracted, the effect is the same as if the summons had been dismissed. The extract protestation contains a precept of poinding and arrestment for recovery of the protestation money, and the dues of the extract.

The use of protestation is almost unknown, the pursuer rarely failing to appear; but it is given here because it seems still to be the only mode of reaching a pursuer who hangs back without appearing at the earlier stages of a cause. There is no authority (as in the case of the Small-Debt Act) for summarily dismissing in absence a summons which the pursuer has failed

(o) A. S. 10 July 1839, § 28, Appx. xlvii.

Discussion on Summons.

to appear to support; and until he has appeared in Court, and has failed to obey some competent order, he cannot be treated as in default. In the case of protestation, the summons is usually not in the hands of the clerk of Court; but though the pursuer had lodged it, it does not appear that the defender's remedy, on the pursuer's failing to support it, would be different, because it is not the mere writ, but the person to support it, whose presence is required.

Section VI.—OF THE DISCUSSION ON THE SUMMONS AND OF CLOSING THE RECORD ON SUMMONS AND MINUTE OF DEFENCE.

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| 1. <i>Hearing Parties on Action and Defence.</i> | 3. <i>Form of Minute of Defence.</i> |
| 2. <i>Decision how Record to be made up.</i> | 4. <i>To what Cases Minute adapted.</i> |

1. *Hearing Parties on Action and Defence.*—When both parties appear either at the first calling of the cause or at an adjournment of the diet, the Sheriff is directed to hear the pursuer in explanation of the grounds of action, and the defender upon the nature of the defence.(r) Each party will find it his interest to state his case as fully as he can. The pursuer should do so, both that the defender may understand his case, and that, after hearing what is said in reply to it, he may satisfy himself that he has everything stated in his summons with sufficient fulness. The defender has even more reason for stating his defences fully, because there may be a minute made of them, on which the record may be closed, thereby preventing him from stating new grounds. And both parties have got beyond the stage (if there ever was one) at which it could be of any use to conceal their hands, because they are on the eve of completing their written pleadings, which must necessarily disclose all the grounds both of action and defence. This meeting for the verbal discussion of these matters before committing

(r) 16 and 17 Vict. c. 80, § 3. (App. lxxii). The adjourned diet must not be later than eight days after the first diet.

Discussion on Summons.

them to writing, was a return made by the Act of 1853 to a very old style of pleading. It has been found of great benefit, and it is equally useful whether the record be closed on the summons and a minute of defence, or whether the parties be allowed to make their statements in more detail by way of condescendence and defences. In the latter case, it has greatly improved the records, the parties having had their attention directed to the points on which issue is to be raised.

2. **Decision how Record to be made up.**—After hearing the parties, it is for the Sheriff to decide how the record is to be made up, whether the defence is to be at once embodied in a minute, or whether the pursuer is to be required to make further statements and the defender then to answer him. The statute has apparently intended to leave this matter entirely in the hands of the Sheriff, but practically it has not done so. He has it entirely in his discretion to order condescendence and defences; but it is not easy for him to close the record in the shorter form without the consent of both parties. Apart from the inexpediency and possible danger of precluding parties who wish it from stating their case fully, there is the technical difficulty that the minute made of the defence must be signed by both parties, and that there is no method of forcing the signature of an unwilling party, except that of treating the refusal as an act of contempt—a proceeding which only a very exceptional case could warrant.

The cases for which the shorter form of record is adapted will be better considered when we have noticed the regulations as to the framing and form of the minute of defence.

3. **Form of Minute of Defence.**—The statute directs the Sheriff, when satisfied that no further written pleadings are necessary, to cause a minute to be written upon the summons, setting forth concisely the ground of defence.^(s) The form of

(s) This does not mean that he is to write it himself. Frequently the defender's agent prepares it, and it is only revised and engrossed in Court.

Record by Summons and Minute.

the minute is provided in a schedule to the Act, and a note attached to the schedule directs that the ground of defence, "dilatatory or peremptory," be stated succinctly. This being done, the minute is then to be subscribed by the parties or their procurators, and the Sheriff thereupon closes the record by writing under the minute "Record closed," and signing and dating the same. Such are the statutory directions, and if the reader will look at the forms given in the schedule he will have a clear idea of the form the minute of defence is to take.

It seems clear, *firstly*, that the minute should embody *all* the defences meant to be raised; *secondly*, that the grounds of defence should be stated (somewhat in the manner in which grounds of action should be stated in the summons, that is, not with details, nor in the form of a narrative, but succinctly) in the form of propositions, each of which should contain a relevant answer either to the whole summons, or to some one of the grounds of action, or of the demands contained in it; and *thirdly*, that it affords no opportunity for the pursuer making any reply to the defender's case.

The form of the minute has, however, been made matter of controversy; and, in particular, it has been disputed whether it is necessary to record the whole defence in it at one time. It has been proposed to divide the minute into two parts, (*t*) made up at separate times, and that in the first part the defender should state (if he have any) what are called his "dilatatory" pleas, the nature of which will be explained in the following section (Art. 14) when they will be more fully treated. Those pleas are then to be disposed of by the Sheriff-Substitute, with a possible appeal to the Sheriff-Depute, and if they are not sustained the defender is then to proceed to state his remaining "peremptory" pleas which are to form the second part of the minute; and then the record is to be closed. It is hardly possible to conceive a proceeding more at variance both with the object of the statute, and with its express words. One of the evils which the Act, and in especial this part of the Act, was intended to

(*t*) See the "Scottish Law Magazine," vol. vi, p. 9.

Record by Summons and Minute.

prevent, was the system of incomplete pleadings—of allowing parties to state first one part of their case and then another. And the express words of the Act are, that the grounds of defence, “dilatory or peremptory,” are to be minuted at the meeting provided for in it, or at but one adjournment of it, and that the record is thereupon to be closed. It is supposed that a difficulty is created by there being a direction in another part of the Act, that in the case of the record being made up in the longer form the dilatory pleas shall be disposed of, where possible, before the record is closed. The meaning of this provision will be afterwards considered, but in the meantime it is enough to point out that the two things are different.

The second observation (that the grounds of defence are to be stated as distinct propositions, and not in a narrative) is one which cannot well be disputed, and yet is frequently disregarded. Very often the minute is found to be a narrative of facts, some essential, some unimportant, from which the grounds of defence are to be reasoned out. Minutes of this kind are unsafe. They show of themselves that the defender has not maturely considered what his answer to the action is to be; and in the mass of details it may happen that the very detail requisite to make the defence relevant has been omitted.

The proposition, that the short record affords no opportunity for the pursuer replying to the defender’s statement, does not admit of doubt. The Act is quite distinct that it is the ground of defence which is to be minuted, and the record thereupon closed. And it is important to attend to this, because, if the rule were once broken, and the Sheriff were to go on to note the pursuer’s reply, there might be no end to it, as the defender might just as reasonably ask permission to add a rejoinder, and so on, till the redundancy of the old forms of record was undone. If the pursuer requires farther statement than what his summons embodies, the place for it is a condescendence, and the record should take the longer form. If the pursuer wants only to admit what the defender says (so as to save proof), he can do that by a separate minute at any time.

To what causes Minute Adapted.

4. To what Cases Minute Adapted.—The power of closing the record on a minute of defence is a very valuable one, but Courts are liable to fall into the mistake of either using it too little, or using it too much. In some Courts the minute is rarely used, although cases must be numerous in which it would be highly advisable. Where the issue is simply one of fact, for example,—whether the defender bought certain articles at a certain time; whether he uttered a certain slander; whether he hired the pursuer as a servant; or whether he dismissed him;—the minute is well adapted. Again, it is suited to the case of the defender denying the relevancy of the summons. It is also suited to the case of his affirming some simple fact, upon proving which he will be entitled to be free from the liability which the summons apparently raises against him. Such cases are those where the drawer of the bill alleges that he got no notice of dishonour. In all such cases the minute should be used. In some Courts, however, there is a tendency to use the short record not only in such cases as those enumerated but in an indiscriminating manner in all cases. Now it is plain that the minute is not adapted to cases where the defender states a defence to which the pursuer has to reply by way of exception; and still more plainly, the minute is not adapted to cases where the defences are complicated, and where complicated investigations of any kind are required.^(u)

(u) See the remarks of Lord Justice-Clerk Hope in *Aithya v. Rowell*, 16 July 1856, 18 D. 1299; and in *Caledonian Canal Commissioners v. Stirling*, 19 Jul 1856. *Ib.* 1319.

 Record by Condescendence and Defences.

Section VII.—OF FRAMING THE RECORD BY WAY OF CONDESCENDENCE AND DEFENCES.

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| 1. <i>Order for Condescendence and Defences.</i>
2. <i>Times for Lodging.</i>
3. <i>Prorogating those Times.</i>
4. <i>Condescendence.</i>
5. <i>Pursuer's Statement of Fact.</i>
6. <i>Adding New Grounds of Action.</i>
7. <i>Whole Case to be Disclosed.</i>
8. <i>Founding on Documents.</i>
9. <i>The Pursuer's Pleas in Law.</i>
10. <i>Defences.</i> | 11. <i>Answers to Pursuer's Statement.</i>
12. <i>Defender's Statement of Fact and Pleas in Law.</i>
13. <i>Meeting after Condescendence and Defences are lodged.</i>
14. <i>Disposal of Dilatory Defences.</i>
15. <i>Revisal of Condescendence and Defences.</i>
16. <i>Adjusting Record.</i>
17. <i>Striking out Irrelevant Matter.</i>
18. <i>Closing Record.</i> |
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1. *Order for Condescendence and Defences.*—When the Sheriff is satisfied at the hearing on the summons that the record cannot be properly made up without condescendence and defences, he pronounces an order directing those papers to be given in.

2. *Times for Lodging.*—The statute directs that the pursuer is to lodge his condescendence within six days of the date of the order, and that the defender is to lodge his defences within ten days after the lodging of the condescendence.(v)

3. *Prorogating Times for Lodging.*—Under the statute the periods for lodging condescendence and defences are “peremptory,” and the penalty may be that the party who is in default may be non-suited with expenses. If the papers are not given in within the periods, the Sheriff is directed either to dismiss the action or to decern in terms of the summons, as the case may be, unless it be made to appear to his satisfaction that the failure to lodge the paper arose from unavoidable or reasonable causes. In this case the Sheriff has power to allow the paper to be received, on payment of such sum of expenses as he may think fit. The statute has evidently contemplated that the paper was to be received at the time of this

Condescendence—Pursuer's Statement of Fact.

allowance, and that payment of a sum in name of expenses was always to be a condition; but frequently the order is pronounced, allowing the paper to be received within a specified time, and without requiring any payment of expenses. Such is the provision which the statute makes, where the application to allow the wanting paper to be received is not made till after the expiry of the proper time. If an application be made before the expiry to have the time extended, the Sheriff may prorogate the time *once* on special cause shown. If he exercise this power, the interlocutor ought to set forth the special cause, and must fix a definite time within which the paper is to be lodged. With the *written* consent of both parties, and the approbation of the Court, the times may always be prorogated.(x)

4. Condescendence.—The condescendence consists of two parts—(1) the pursuer's "statement of fact," and (2) his "pleas in law." Each of these requires separate notice. The condescendence, when given in, is authenticated by the signature of the party, or of his agent; and if the person who drew it is different from the person who signs it, the drawer's name must be given.(y)

5. Pursuer's Statement of Fact.—The statement of fact sets forth articulately and as concisely as may be (without any argument or unnecessary matter) the facts necessary to found the conclusions of the summons which the pursuer avers and is ready to prove. These are the requirements of the Act of 1853; and it will be instructive to compare them for a moment with the requirements of the Act of Sederunt of 1839, which they superseded.(z) In the "reply," which, under the Act of Sederunt corresponded with the present condescendence, the

(x) 16 and 17 Vict. c. 80, § 6. (App. lxxiv.)

(y) A. S. 10 July 1839, § 63. (App. liii.) The same rules apply to the authentication of all other pleadings. If the statement as to the drawer be inaccur-

ate, the costs of the pleading may be disallowed; *Dick v. Richardson*, 2 July 1841, 8 D. 1141.

(z) A. S. 10 July 1839, § 36. (App. xlix.)

Record by Condescendence and Defences.

pursuer commenced by setting forth articulately and in substantive propositions, without argument, the whole facts on which he founded; which facts were limited to such as were comprehended within the general statement in the summons. The two sets of provisions differ in two particulars. The Act of 1853 requires greater conciseness in the mode of statement, and it allows greater latitude as to the substance of what may be stated.

The condescendence, then, is to contain the facts necessary to found the conclusions of the summons. These are set forth in the form of a narrative, and with more fullness than in the summons itself. This is the time for supplying any want in the specification of dates, places, or other details. The condescendence should thus give in a concise articulate narrative the facts to which the summons may only allude. So far there is no difficulty.

6. Adding New Grounds of Action.—Difficulties arise when the pursuer wishes to add new grounds of action not clearly comprehended within the grounds of action libelled in the summons. Here it is necessary to distinguish three cases—*firstly*, when the new grounds to be added are of the same kind as those contained in the summons, and are therefore in a manner supplementary to it; *secondly*, when they are not of the same kind, but are altogether distinct; and *thirdly*, when they arise as matter of replication to the defender's case.

When the new grounds of action are of the first kind, great latitude is allowed to the pursuer in the way of making additions. This latitude was allowed even in the Court of Session, where, previous to the Act of 1868, the rules as to pleading were more stringent than in the Sheriff-Court. Thus, while in an action against the drawer of a bill, it is clear that the statement that the bill has been duly negotiated is a material ground of action, it has been held that, when omitted in the summons, it may be added in the condescendence.(a) A

(a) *M'Donald v. M'Quarrie*, 29 Feb. 1860, 22 D. 922. In the Court of Ses-

Adding New Grounds of Action.

still stronger illustration of this principle was afforded in an action for damages for slander, where a pursuer was allowed to add in his condescendence two new instances of the alleged slander, uttered at different times and places, and before different parties from those stated in the summons.(b) Whenever, therefore, the new matter added in the condescendence, though it may technically form a new ground for supporting the action, does not in any material way alter the nature of the case laid against the defender in the summons, but merely states it with greater amplitude and completeness, the new matter should not be rejected, and no just and reasonable system of pleading would require its rejection.

When the new grounds of action are not of the same kind, and do not supplement those stated in the summons, the pursuer cannot competently add them.(c) This rule was laid down in the Court of Session.(d) It was also (by the express direction of the provisions quoted in the preceding article) the old rule in the Sheriff-Court, and it does not seem possible to extend the greater latitude allowed by the new Sheriff-Court Act so far as to admit the addition of entirely new grounds of action. But if the pursuer does insert new grounds of action, it does not necessarily follow that he is to withdraw them at once on that being discovered, for they may be looked at in explanation of the original grounds of action, or of his reply to the defender's statements.(e)

In the third case, when matter not covered by the summons is introduced into the condescendence by way of reply to

sion it is the revised condescendence which corresponds to the Sheriff-Court condescendence, and in the text allowance is made for this difference.

(b) *Hewatson v. Irving*, 10 Mar. 1853, 15 D. 519. See preceding note. The additions in this case seem to have gone to the full length which is permissible, for they were allowed with great difficulty, and only on payment of expenses.

(c) Sometimes they may be added by an "amendment of the libel," which see *infra*, Chap. III, S. iv.

(d) *Burness v. Goodfellow*, 5th June 1858, 20 D. 1084; *London Joint Stock Bank v. Stewart*, 14 Jan. 1859, 21 D. 250.

(e) *Macdougall's Trustees v. Law*, 18 Nov. 1864, 3 Macph. 68.

Record by Condescendence and Defences.

the grounds of defence brought forward by the defender at the first hearing, it cannot rightly be said that it forms a new ground of action at all. It is matter of replication, which it is of necessity competent for the pursuer to add. When a pursuer, for instance, brings an action of slander which does not (on the face of it) disclose a case of privilege, but where the defender pleads matter in defence which does disclose such a case, it will be competent for the pursuer to reply in the condescendence that the slander was spoken maliciously and without probable cause. To take another illustration, if a pursuer found upon a bond, and the defender pleads that it is not duly authenticated, the pursuer may plead, by way of replication, that the defender is barred by *rei interventus* from stating the objection.(g) These illustrations sufficiently explain the principle.

7. **Whole case to be Disclosed.**—The pursuer must take care that the condescendence discloses his whole case. He is not to state the evidence by which he means to prove it, but he must state the facts themselves which he means to prove; and should he fail to state them, he will be foreclosed from proving them. It is not always possible to distinguish exactly between what is merely evidence which should not be stated, and the fact which must be stated. In case of rational doubt it is better to insert the statement. Where not inserted, the question as to the competency of the proof lies over till the evidence is tendered. While, however, the pursuer must disclose his whole case, he is not to indulge in argument; and here there is no room for mistake, and therefore no excuse for transgressing. In the exclusion of argument there must also be taken to be excluded that accumulation of epithets and adjectives (argument in a bad shape) which a pleader is sometimes tempted to heap over a weak case to give it a formidable appearance.

8. **Founding on Documents.**—If the mistake had not been

(g) *United Mutual Mining and General Life Assurance Society v. Murray*, 18 June 1860, 22 D. 1185.

Pleas in Law.

made, it could hardly have been thought necessary to point out that, as the relevancy of a case is to be judged of by the statements on record, no letters or other documents can be looked at in a question of relevancy, unless they are properly referred to and adopted as part of the record. It is not enough to produce them to the Court along with the condescendence. They must be referred to, and the pursuer must also state what facts he holds them to establish. This ought to be done in such a way that every thing necessary for judging of the relevancy of the action may appear on the face of the record. It is both irregular and clumsy to quote documents at full length, but this, of course, is better than leaving them out.(h)

9. Pleas in Law.—The second part of the condescendence contains a note of the pleas in law which the pursuer is to maintain. There are few things more difficult to do well than to make a good plea in law. Abstract legal propositions, on the one hand, are not pleas in law. On the other hand, the error may be committed in the opposite direction. Thus, a note that, “in the circumstances set forth in the condescendence, the pursuer is entitled to decree as asked, with expenses,” is not a plea in law. Commenting on this form, the Lord President Inglis defined a plea in law as “a distinct legal proposition applicable to the facts of the case.” The plea which the Court allowed to be substituted may be taken as a good example. It explains of itself the nature of the case, and was in these terms:—“the pursuers having been employed by the defender as shipbrokers to procure a charter of the defender’s vessel, and having in respect of said employment performed the acts and rendered the services set forth in the condescendence, are entitled to decree in terms of the conclusions of the libel, with expenses.”(i)

Each plea should be complete in itself, and each should set

(h) See *Connell v. Ferguson*, 6 March 1861, 23 D. 686, and *Gordon v. Davidson*, 26 Feb. 1864, 2 Macph. 769.

(i) *Young v. Graham*, 20 Nov. 1860 3 Macph. 36.

Record by Condescendence and Defences.

forth some ground in law on which the pursuer maintains that one or more of his conclusions should be granted; or, if there be a question as to the mode of proof, on which he maintains that proof of some kind is competent or incompetent, as the case may be. The multiplication of incomplete pleas in law, which advance the pursuer only a step towards his conclusion, is both inconvenient and confusing, and is liable to the objection of being argumentative. When the practitioner feels tempted towards this course, it should be remembered that in very many cases there is not room for the pursuer having more than one plea in law.

10. Defences.—The defences consist of two, and, where necessary, of three parts. In the first part the defender sets forth articulately his answers to the condescendence. In the second (when he finds it necessary) he sets forth articulately, and under a separate head, the counter statements required for his defence, which he avers and is ready to prove. Thirdly, the defender appends a note of his pleas in law. The Act of 1853 directs that the defences shall be framed as concisely as may be, without argument or unnecessary matter.

11. Answers to Pursuer's Statement.—There are no directions in the Act of 1853 for framing answers to the pursuer's statements, but the directions in the Act of Sederunt of 1839 seem still applicable. Under these, the defender meets in their order the pursuer's statements of fact, by admitting or denying them, either absolutely or with qualifications, but without argument, and with such explanations in point of fact, applicable to each averment, as are necessary to make his answers intelligible.(d) Under these directions, the answer to each article must be concise, and should be specific. If the defender desires to admit the greater part of one of the pursuer's statements, the answer should be "admitted with the exception of [pointing out the disputed part] which is denied," or "not admitted," as

(d) A. S. 10 July 1839, § 32 (Appx. xlviii).

 Defender's Statement of Facts and Pleas in Law.

the case may be. If he means only to admit a small part, his answer refers to and admits it, and adds, *quoad ultra* denied, or not admitted, as may be. Each answer must be complete in itself. A form in common use, of denying under reference to the defender's statement is objectionable, as it is neither complete nor clear. Another form in common use, that of denying a statement in so far as it is inconsistent with the defender's statement, is also objectionable. The defender generally takes it to mean more than it does; and forgets that in using it he may be admitting statements destructive of his case, but which, being possibly true over and above, are not inconsistent with his averments.^(e) Where the defender desires entirely to rest upon his own account of the matter, the proper form of answer is one which was suggested by Lord Curriehill,^(g) viz., to deny the pursuer's averments in so far as they do not coincide with his own. But this form of answer, though the only one of its kind that is accurate, is not often to be recommended. The use of counter averments in the answers to the pursuer's averments should be sparing. The proper place for these is (as the statute points out) in the defender's own statement of fact. Of course, all equivocal answers must be carefully avoided, as these will be construed against the party making them.

If the condescendence contains any statement of fact which is within the defender's knowledge, and the defender do not deny it, he will be held to have admitted it.^(h)

12. Defender's Statement of Facts and Pleas in Law.—The observations to the mode of framing the pursuer's statement of facts and pleas in law, are in general applicable to the framing of the corresponding pleadings for the defender. The defender is under no restriction as to the grounds of defence which he may state, as there is nothing to limit him in any way to those grounds which were opened upon at the hearing on the sum-

^(e) *Andersons v. Low*, 13 Nov. 1863, 2 Macph. 100.

^(g) See *Campbell v. Campbell*, 8 Jan. 1863, 1 Macph. 217.

^(h) A. S. 1839, § 55 (Appx. lii).

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mons. Like the pursuer he must take care, however, that he now discloses his whole case. For example, if he objects to the pursuer's title he must state the nature of his objection, for he would not be allowed under the objection of no title, to bring up objections of which the pursuer has no notice.(i) The defender's statement must contain all the facts necessary to found his pleas; and he must append a note of them, similar in character to the pursuer's. It is advisable, as tending to clearness, that he should so frame his pleas as to show distinctly which of the pursuer's propositions he controverts, and what separate propositions he sets up on his own behalf. The defender must now state all his pleas in law at once. The privilege which the methods of pleading in use before 1853 gave to him of stating first his dilatory pleas, and then his peremptory pleas, has been abolished.

13. Meeting after Condescendence and Defences are lodged.—On the defences being lodged, the Sheriff-clerk transmits the process to the Sheriff, who then, or at latest within six days after the lodging, directs the parties or their procurators to meet him.(k) If the defences contain a separate statement of fact, it is convenient, in the interlocutor fixing the meeting, to appoint the pursuer to add his answers to it, to his condescendence, as this will shorten the business of the meeting.

The Act of 1853 gives the Sheriff power to adjourn the meeting if he shall see fit. He is not required to assign any special reason for adjourning, but he is authorised to make only one adjournment, and that for no longer a period than eight days. If both parties do not consent to a farther adjournment, the Sheriff must conclude the appointed business at the second meeting.

14. Disposal of Dilatory Defences.—The first business at the

(i) *North British Railway Co. v. Brown, Gordon & Co.*, 12 June 1857, 19 D. 842. (k) 16 and 17 Vict. c. 80, § 4 (App. lxxiii).

Disposal of Dilatory Defences.

meeting is (where possible) to dispose of any dilatory(*l*) defences that may have been stated. If it be not possible to dispose of them at once, the Sheriff may reserve consideration of them till a future stage of the cause.(*m*) These provisions have given rise to discussion. Some have read them as a direction to the Sheriff to continue the old practice of deciding on the dilatory defences before closing the record; of then allowing an appeal upon that decision; and of the not closing of the record (though the papers lie ready) or looking at the merits, until the appeal shall have been disposed of, and the case returned to him. This way of reading the provisions makes it always competent for the defender to interpose two discussions—one on the dilatory defences, and another on the relevancy—and two periods of appeal between the lodging of the defences and the allowance of a proof; and as dilatory defences are frequently lodged for the purpose of delay, direct encouragement is given to an abuse of the forms of process. This reading also cannot be what the statute intended, for the direction to “dispose (when possible) of” the dilatory defences cannot be read as a simple direction to decide upon them at that time,—it being of course always possible to pronounce a decision. A more reasonable meaning is given to the provisions when the direction to dispose of the dilatory defences, where possible, is taken to mean to dispose of them at that time, wherever it is practicable by some order, or step of proceeding, to put an end to them altogether. Thus, if a dilatory plea be stated that all parties interested in the action were not called as parties, the provision would be held to mean that the Court was then to consider whether the plea could not at once be disposed of by pronouncing an order for the calling of such additional parties as might be requi-

(*l*) Dilatory defences “are those which have the temporary effect of obtaining for the defender a sentence absolving him from the depending suit, without cutting off the pursuer’s right of bringing a new action;” Ersk. 4. 1. 67. Pleas on the relevancy are not dilatory defences

(though they are sometimes confounded with them), because, if the action is found irrelevant, it can never be brought again. Compare *Hill v. Dymock*, 7 July 1857, 19 D. 955.

(*m*) See note (*k*), p. 82.

Record by Condescendence and Defences.

site; and if that appeared practicable, to pronounce the order—a course which, in the circumstances, would be at once the most convenient, and in the end the most expeditious.⁽ⁿ⁾ And there are other cases where the dilatory pleas are founded in like manner on matters capable of rectification, where it may be desirable and practicable to dispose of them at once. For such cases the provisions of the Act seem adapted; and this meaning is in accordance with modern views on the matter of pleading, which are all in favour of preparing a case for judgment at once on all the points involved, and quite against the piecemeal decision of difficulties. As already said, it is of course always possible for the Sheriff to give a decision on the dilatory defences, but where it is not possible for him to dispose at once of them in such a manner as will give a reasonable prospect of being done with them, the proper course appears to be to pronounce an order reserving them for consideration at a future stage, and to proceed with the closing of the record.^(o)

It has sometimes been maintained that dilatory defences are to be held as repelled, if they are not expressly reserved in the interlocutor closing the record. This may have been true at one time in the Court of Session, but even there the more sensible rule, that the defences are to be held as reserved when not expressly repelled, has been acted on since the Judicature Act;^(p) and there is no ground for supposing that any different rule could be applied in the Sheriff-Courts.

15. Revisal of Condescendence and Defences.—The dilatory defences (if any) having been disposed of, or reserved, the Sheriff proceeds to the next business of the meeting, and there

(n) Compare *Watt v. Kempt*, 22 March 1865, 3 Macph. 730, which illustrates the inconvenience of this course not being followed.

(o) The practice in the Court of Session under the Judicature Act (6 Geo. IV, c. 120, § 5) does not rule this matter, because the provision was quite different.

There the Lord Ordinary was directed to hear parties and decide on the dilatory defences before closing the record, and he had no power to reserve them, except in the case of their requiring proof.

(p) *Johnstone v. Arnott*, 28 Jan. 1880, 8 S. 383.

 Revisal of Condescendence and Defences.

are now two courses open, either to adjust and close the record on the papers as they stand, or to order the parties to revise their papers. The latter course is followed if it appears to him that the pleadings are insufficiently stated, and require more alteration than can well be made on them in "adjusting;" and in this case the adjustment and closing is reserved till a meeting held after the parties have lodged their revised papers.

The Sheriff's power to order revisal of the condescendence and defences respectively is limited to one revisal. This revisal is made upon the original papers, unless the Sheriff for some special cause sees fit to direct to the contrary.

The power to order revisal cannot be exercised where the pursuer is willing to close on the condescendence (*q*) and defences. The pursuer is not bound to give this consent in an unqualified form, but may add to it a general denial of the defender's averments in so far as they do not coincide with his own. (*r*)

The power to order revisal is not much exercised, as the additions required at this stage should not be large, and in that case are better made at adjusting. When the order to revise is given, the pursuer has the same latitude (and no more) in adding new matter to his condescendence as he had when framing it in adding to his summons; and the defender has a similar latitude in adding to his defences. The pursuer should at the same time add, or (if they have been already added) revise his answers to the defender's statement.

There being no time fixed by the statute for revising, the time should be fixed in the interlocutor. The time that is fixed is peremptory, to the same effect as in the case of lodging the original papers. When the revised defences are lodged, the clerk transmits the process to the Sheriff, who thereupon appoints the parties as before to meet him as soon as may be, and at latest within six days after the lodging of the revised

(*q*) Misprinted "summons" in the Act 16 and 17 Vict. c. 80, § 4.

(*r*) *Campbell v. Campbell*, 8 Jan. 1863,

1 Macph. 217. This case was decided on section 3 of the Court of Session Act 1850, which is in similar terms.

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defences. The meeting, after revising, may be adjourned in the same way as the original meeting. (See *supra*, Art. 13.)

16. Adjusting Record.—At the meeting to adjust the record, the Sheriff allows the pursuer (if this has not already been done) to add to his condescendence his answers to the defender's statement of fact. In place of these answers, the pursuer may simply minute his denial of the defender's statements, if this be deemed sufficient by the Sheriff. This minute of denial, it is presumed, may be made conditional in the manner pointed out in the preceding article. The pursuer's answers, or this minute, having been recorded, the Sheriff allows each party to adjust his own part of the record. In doing this, it is clear that neither party has the power, without the consent of the Court and of the opposite party, to add any new statement to the record. The power is simply to adjust the record of the statements that have already been made, and it should not extend beyond the correction of any inaccuracies, and the addition of any explanation required, either by the answers of the opposite party, or for the sake of clearness. If it be discovered at the meeting that new statements of fact are required, the proper course is to order a revisal. As no alteration or addition to a paper once lodged can be made without the leave of the Court,^(s) parties must take care in adjusting that their alterations, before being made in a permanent form, have first been seen and allowed.

17. Striking out Irrelevant Matter.—After all this has been done, the statute places on the Sheriff the duty of striking out of the record any matter that he may deem to be either irrelevant or unnecessary.^(t) This power is given, or rather the duty is imposed, in very absolute terms, but it has nevertheless to be exercised with great caution. There is no duty more delicate for a judge than that of dictating to a party how he is

(s) *Beid v. Meuz*, 17 Dec. 1861, 24 D. 221.

(t) 16 and 17 Vict. c. 80, § 4 (App. lxxiii).

Closing Record.

to frame his pleading, or of restricting him as to what he may set forth. The power is therefore not to be exercised except in clear cases of irregularity. But it is sometimes useful, especially where a party introduces personalities against his opponent or others, or grossly abuses the forms of process.

18. *Closing Record.*—The last proceeding at the meeting is to “close the record,” a proceeding which the parties always approach with more or less reluctance, from the effect it has in tying them down to the statements they have made, and in almost preventing amendments even in the most reasonable circumstances and on the most equitable terms. The record is closed by the Sheriff writing on the interlocutor sheet the words “record closed,” and signing and dating the same. The consent of the parties to this proceeding was formerly, but is not now, required. Indeed it is competent for the Sheriff to close the record though one of the parties should be absent, if he be absent without sufficient cause. The Act of Sederunt of 1839, by a provision which is still in force, requires the Sheriff, as soon as the record is closed, to initial all the alterations or additions which may have been made on the margins of the papers before closing.^(u)

Section VIII.—OF PRODUCING AND RECOVERING DOCUMENTS
FOUNDED ON IN THE RECORD.

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| <ol style="list-style-type: none"> 1. <i>Introductory.</i> 2. <i>Regulations as to Producing Documents.</i> 3. <i>What Documents must be Produced.</i> | <ol style="list-style-type: none"> 4. <i>Diligences to Recover Documents.</i> 5. <i>What Documents Recoverable.</i> 6. <i>Recovering Documents before Pleadings lodged.</i> 7. <i>Mode of Carrying out Diligences.</i> |
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1. *Introductory.*—The law obliges parties to produce documents in their possession, on which they found in their pleadings, either along with the pleadings themselves, or at latest

(u) A. S. 1839, § 45 (App. II).

Producing and Recovering Documents.

before the record is closed. But the law is not in a satisfactory state. In point of form, it is contained in the Act of Sederunt of 1839, and is adapted to pleadings not now in use. In point of substance, it has the greater defect of not clearly distinguishing between two classes of documents, which are distinct enough in themselves—between those documents, on the one hand, which are themselves grounds of action or defence, and which (on their signature being admitted) of themselves establish the existence or discharge of the claim sued on,—and those documents, on the other hand, which are only to be used as part of a general proof, such as might be laid before a jury. In the one case it is right that the writs sued on, or pleaded in defence, should be produced with the pleadings; but in the other case it is unfair to make a party produce part of his proof until he is prepared to lay the whole before the Court.

The law as to the recovery of documents founded on in the pleadings which do not happen to be in the possession of the party is in a better state. If the documents are of the first kind to which we have referred, it is right that they should be produced before the pleadings are closed, and the law provides for this. When they are admitted to be in the possession of the opposite party the Sheriff can order them to be produced or exhibited. Should the opposite party deny having them, or should they be in the hands of third parties, the mode of recovering them is by a “diligence,” under which the alleged “havers” are examined on oath as to the fact of possession, and are made to produce or exhibit the documents unless they can show a right to refuse. If the documents are of the second kind referred to, there is also power to enforce their production by way of diligence; but as the authority of the Sheriff is required, he must have a discretion as to the granting or refusing of the diligence, and he will probably refuse, until the record is closed, to give any diligence to recover documents to be used in evidence. Indeed, he will in general refuse to give any assistance towards the recovery of documentary evidence until the rest of the evidence is being taken, unless it be made very

Regulations as to Producing Documents, &c.

clear that the production of the documents before the parole proof is either necessary for the justice of the case, or will be attended with great convenience in the special circumstances.

It is necessary, however, to go over these matters in detail.

2. Regulations as to Producing Documents.—By the Act of Sederunt of 1839 (§ 23), the pursuer is directed to produce at the calling, along with his summons, the deeds, accounts, and other writings on which he founds, so far as the same are in his custody or within his power. The day appointed for the hearing on the summons may be taken as equivalent to the calling.

With regard to the defender, section 33 in like manner provides that he must produce, along with his defences, the deeds or writings on which he founds, so far as the same are in his custody or within his power. The time fixed in this regulation may correspond with the statement by the defender of his grounds of action when the record is closed on a minute.

The Act of Sederunt (§ 51) next provides that when parties lodge condescendence or answers (corresponding with the present condescendence and defences), they are to produce therewith all the writings in their custody, or in their power (not already produced) on which they mean to found. This section goes on to direct that when books of business are founded on, excerpts (copies) from them may be produced in the first instance, the books themselves being produced in the course of the proof if required.

Hitherto there is no penalty on non-production, but the Act of Sederunt now provides (§ 56) that after the record has been closed, no new productions, within the power of the party, shall be allowed or received.(x)

3. What Documents must be Produced.—The duty of a party to produce documents, which are in his custody or within his

(x) It is a common practice in the interlocutor closing the record specially to reserve right to each party to make productions within a certain limited period.

Producing and Recovering Documents.

power, along with his pleadings, or at latest before the record is closed, is here made distinct; and if a party wishes to keep himself quite safe, he may make the cause a receptacle for every scrap of paper he can get at which may by possibility have any reference to it; but this is not always convenient or expedient.

If the provisions are read literally, they would seem to preclude parties from producing, after the specified period, any documents whatever which had previously been in their custody or power. The provisions say all writings, without making any distinction between one class and another. But it is not reasonable to read them in so strict a way. They should be read in connection with the subject with which they are dealing, and as they deal with the pleadings, it is not reasonable to extend their penal scope beyond what is requisite to make the pleadings complete and intelligible. It is believed that in practice they are so read. Under a system which contemplates only two kinds of judgment, either one on the relevancy, or one on a concluded proof, it is useless and confusing to ask (before proof is allowed) for production of documents which can have no possible effect on the relevancy of the action or of the defence, and which are of value only *in modum probationis* after proof has been allowed. Accordingly the Sheriff-Courts in general follow in this matter the rules laid down for jury trials. There may be, however, reason to doubt whether this is the strict reading of the regulations; and when the question arose on the somewhat similar provisions made by the Judicature Act for the Court of Session, there was a difference of opinion in regard to it, the majority being against the reasonable and in favour of the strict interpretation.^(y) Parliament has since altered the Court of Session Regulations.^(z)

4. Diligences to Recover Documents.—If the documents on which a party founds are not in his custody or power at the

(y) *Borthwick v. The Lord Advocate*,
5 Dec. 1861, 24 D. 130; *Kelley v.*
Robinson, 16 Nov. 1864, 8 Macph., 53.

(z) 31 and 32 Vict., c. 100, § 99.

What Documents Recoverable, &c.

time of lodging his original pleadings, the Act of Sederunt (§§ 23 and 33) directs him to state where they are, and empowers him then to ask for a diligence to recover them. After he has lodged his final pleadings, if they are still not in his custody or power, he must take a diligence to recover them (§ 51). The object of forcing him to take a diligence at this stage is, that the opposite party may see all the documents on which he founds in his pleadings before the record is closed. If the party neglect to recover them at this time, when he is directed to do so, the opposite party will have right to object to his doing so afterwards.

5. What Documents Recoverable.—The right of a party to ask for a diligence before the record is closed is limited to one for the recovery of those documents on which he founds in his own pleadings. There is no authority given him to ask for a diligence to enable him to recover documents on which his adversary alone founds; and this is quite unnecessary, because if the opposite party do not produce or recover them when he is directed to do so, he will lose the benefit of them. And before the record is closed, a party will not be allowed a diligence to recover documents wanted by way of proof, because the Sheriff has a discretion to refuse the diligence, and he will certainly do so when another opportunity has been allowed at a subsequent stage for recovering such documents.(a)

6. Recovering Documents before Pleadings lodged.—The Act of Sederunt of 1839 contains no provisions for granting diligences in certain circumstances where the Court of Session has a discretion to do so. In that Court, where a party desires to found on writings which are not within his own reach, and which his adversary does not produce because he has not founded on them, there is a discretionary power of giving a diligence to recover the writings before forcing the pleading to be lodged. The rules which the Court of Session follow in

(a) A. S. 1839, chap. ix.—*Proof and Circumduction*, App., p. liv.

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exercising this discretion are not very clearly laid down; but while a party is not allowed to use this diligence for the purpose of fishing for documents to see if they will afford him any ground of action or defence, and while no general rule is followed, it seems that he may get the diligence where his object is only to bring forward his statements in a specific form.^(b) These rules reduce the power of granting diligences to recover documents to be founded on, before the relative pleadings are lodged, to a minimum. In fact, they scarcely allow of its being exercised at all before the first pleadings are lodged, and therefore limit it to the case of the diligence being required before revisal or before closing. When the rule is so reduced, it comes very near to the powers conferred on the Sheriff by the Act of Sederunt.

7. Mode of Carrying out Diligences.—When diligences are granted, they are carried out under the same rules as commissions to take other evidence. The only difference is, that the party craving the diligence first lodges a specification, stating the writings he wants, and that the commission is then granted to him to recover them, or such part of them as the Sheriff may think fit. The havers are cited like witnesses, and a copy of so much of the specification as concerns each is served on him at the time of citing. Their examination proceeds in the same way as the examination of a witness, except that it is limited to the questions whether they have the documents called for, or have any knowledge of what has become of them. If the havers refuse to produce the documents, the objection is dealt with in the same way as the objection of a witness to answer.

(b) *Dickson on Evidence* (2d ed.), § 1338, note 4.

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Section IX.—OF THE PROOF.

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| 1. <i>Of allowing Proof.</i> | 9. <i>Examination in Chief and in Cross.</i> |
| 2. <i>Form of the Order</i> —"Before Answer,"— <i>Prout de jure—Habili modo.</i> | 10. <i>What Questions competent.</i> |
| 3. <i>Precognition of Witnesses.</i> | 11. <i>Witness objecting to Produce or Depone.</i> |
| 4. <i>Citation of Witnesses.</i> | 12. <i>Fixing Witnesses' Expenses.</i> |
| 5. <i>Proceedings at Diet—What if Party absent.</i> | 13. <i>Recalling Witnesses.</i> |
| 6. <i>Witnesses to be examined separately.</i> | 14. <i>Recording the Evidence.</i> |
| 7. <i>Oath or Affirmation to be taken.</i> | 15. <i>Adjourning the Proof.</i> |
| 8. <i>Examination in initialibus.</i> | 16. <i>Declaring Proof Closed.</i> |
| | 17. <i>Allowing Additional Proof.</i> |
| | 18. <i>Proof in Replication.</i> |

1. *Of allowing Proof.*—After the record is closed, the statute of 1853 directs the Sheriff to hear the parties upon the merits of the case and on their respective pleas; or, where he deems proof to be necessary, to appoint a diet for proof.^(a) This places on the Sheriff the duty of looking at the record, with the view of seeing whether there are materials for disposing of the case without proof, or whether a proof is necessary. If there be room for doubt, he will send it to the debate roll; but if there be no room to doubt that a proof is requisite, it is unnecessary to send the case as a matter of routine to the debate roll. On closing the record, it is convenient to ask the parties what they think on this point; and, on hearing their view, the Sheriff will generally be able to decide at once whether to order a debate or to allow a proof. If he appoint a debate on the relevancy, the proceeding is the same as in a debate after a concluded proof, and the little that requires to be said on the subject will be said afterwards. If either with or without a debate he allow a proof, the form of order requires consideration.

2. *Form of Order for Proof.*—"When a proof is allowed in cases in which no averments are made by the defender, the proper interlocutor is, to 'allow the pursuer a proof of his averments, and to the defender a conjunct probation;' but when

(a) 16 and 17 Vict. c. 80, § 5 (App. lxxiv).

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the defender makes averments, and both parties are allowed a proof, a form of interlocutor not unusual in such a case, viz., to allow both parties a proof, and to either party a conjunct probation, is erroneous and misleading. In such cases, the proper form of interlocutor is, 'allow both parties a proof of their respective averments, and to the pursuer a conjunct probation,' because the defender is bound to lead his conjunct probation when he leads his proof in chief. After the pursuer has led his proof in chief, and the defender his conjunct probation and proof in chief, the pursuer is entitled to a probation conjunct to the defender's proof in chief; but after that the defender is entitled to no farther proof, unless he can show that proof has been led in the pursuer's conjunct proof of such a nature as entitles him to a proof in replication, in which case he must apply to the Court for leave to lead such proof in replication, and must show cause why it should be allowed." (a)

If part of the case only is relevant to go to proof, that part should be distinguished by the interlocutor. (b) It is often not advisable to endeavour to do this, as involving a judgment on a partially disclosed case. In such cases, as well as in cases where the whole relevancy is doubtful, it is customary to allow a proof "before answer," which has the effect of reserving entire every question of law and relevancy raised on the record. This form of interlocutor does not however reserve questions as to the admissibility of evidence; and if in any case it should be found desirable to take the evidence first, and then judge of its admissibility afterwards, the order for proof should be specially framed to make that clear. (c)

When proof is allowed *prout de jure*, it means that parole

(a) *Per* Lord Justice-Clerk Inglis in *Magistrates of Edinburgh v. Warrender*, 11 Nov. 1862, 1 Macph. 13. For the mode of applying for proof in replication, see *infra*, art. 18.

(b) In practice this is only done when the part not allowed to go to proof is considerable. If the great bulk of a case

is relevant, an interlocutor allowing a proof of it is not understood to mean that every word is relevant; and objections to the admissibility of particular parts of the evidence remain open.

(c) *Robertson v. Murphy*, 7 Dec. 1867, 6 Macph. 114.

Precognition of Witnesses.

proof and every kind of evidence that might be laid before a jury is to be admitted. When proof *habili modo* is allowed, it is understood to mean that the whole, or some part of the proof, to be ascertained in the course of leading it, is to be limited to the writ or oath of the party's opponent.(d) These expressions in allowing proof are, however, somewhat antiquated, and it is better for the judge to embody his meaning in the English language, as the phrases are now apt to be misunderstood.

In the order for proof it is unnecessary to insert a warrant to cite witnesses and havers; because the Act of 1853 makes a certified copy of the order itself a sufficient warrant for all such citations.(e)

3. Precognition of Witnesses.—In all cases depending on fact, the witnesses should be precognosced at the earliest stages. There are few who have not seen instances of the inconvenience produced by delaying the ascertainment of the facts till after the pleadings were closed. The expense however of precognosing witnesses not being allowed in practice as a charge against an opponent until an order for proof has been pronounced, precognitions generally take place at this stage.(f)

In taking precognitions, the agent must take care that he does not examine the witnesses in presence of each other. If he does, the value of the evidence will be so much destroyed, that in delicate cases it will be held to turn the balance against him. Precognosing witnesses in presence of each other used indeed to be fatal. Now, however, this course would not be followed. The evidence would be recorded, but probably full effect would not be allowed to it. It is therefore always a piece of gross imprudence and mismanagement (as Lord Jeffrey has said) to precognosce witnesses in this way; and if doing so has in any way tended to imperil the case of the opposite party, it

(d) *Gray v. Scott*, 9 Jan. 1868, 6 Macph. 197.

(e) 16 and 17 Vict. c. 80, § 11.

(f) A. S. 1st March 1861, art. 16, note (b) (App. ccxliij). At one time this

was the only stage at which a precognition could well take place. Prior to 15 Vict., c. 27, § 1, it was a fatal objection to examining a witness, that he had been precognosced after he was cited.

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may even lead to the evidence being altogether rejected.(h) The witness who is being precognosced must not be put on oath;(i) and it appears questionable whether he should be asked even to sign his statement.(j) In criminal cases, a witness who has been precognosced on oath may insist on having his deposition destroyed before giving his evidence, so that he may not be deterred from speaking the truth by the fear of contradicting any former statement.(k)

4. **Citation of Witnesses.**—A certified copy of the interlocutor fixing the diet of proof, or of the portion of a wider interlocutor which related to that matter, is a sufficient warrant to any Sheriff-officer, acting within his own county, to cite witnesses and havers at the instance of either party to attend the proof. If witnesses from another county require to be cited, the certified copy must be indorsed by the Sheriff-clerk of the other county, and thereupon an officer of that county cites. If a witness or haver is required to produce documents, it is desirable that the officer should at the same time serve upon him a schedule specifying what documents will be asked from him, so that the witness may bring them with him. There is no specified period of notice which a witness can claim, but it is advisable to cite at least forty-eight hours before the time for taking the proof; because if that amount of notice is given, and the witness does not attend, he is liable to have a fine of two pounds summarily imposed upon him, unless "reasonable excuse be offered and sustained by the Sheriff." Moreover, in that case, he is liable, on failing to attend, to have letters of second diligence issued against him, under which he may be apprehended. The statutory provisions on this point do not specially take into account that forty-eight hours may possibly be too short notice for parties resident beyond the county; but

(h) *Beid v. Duff*, 18 Feb. 1843, 5 D. 656, *Dickson on Evidence*, §§ 1751, 1752.

(i) 5 and 6 Will. IV. c. 62, § 18.

(j) *Duncan v. Thomson*, 16 July 1884, 12 S. 935.

(k) 2 Hume's Commentaries, 381.

Proceedings at Diet for Proving—Witnesses Examined separately.

the Sheriff must take that into consideration when considering what is a reasonable excuse.^(l)

It is now no objection to a witness that he has appeared without citation.^(m)

5. Proceedings at Diet for Proving.—The proof proceeds upon the day appointed. If, by accident, it be taken on a prior day, the presence of the parties implies their consent, and prevents either of them from afterwards objecting.⁽ⁿ⁾ If the party who has been appointed to begin the proof should fail to appear, the Sheriff may (unless some good excuse be stated) decern against him by default, or allow the opposite party (if he wishes it) to go on with his evidence, or (if the party present consent) adjourn the proof, and find the absent party liable in expenses. If a party to whom a conjunct probation has been allowed is absent, the proper course is for the other party to go on with his proof, and close the proof when he is done. If a party appear, but tender no evidence, the opposite party is allowed to lead his. When one party has led proof, but the other (whether present or absent) has not, the case is afterwards debated and disposed of on the footing of the party who has led no proof having none to lead.

6. Witnesses examined separately.—The witnesses are inclosed and examined one by one in such order as the agents select. None of the witnesses are to be present during the examination of the others without leave obtained beforehand from the Sheriff. It was at one time a fatal objection to a witness that he had been so present, but the Court has now discretion to admit the witness if it appear that his presence was not the consequence of culpable negligence or criminal intent; that he has not been unduly instructed or influenced by

(l) 16 and 17 Vict. c. 80, § 11 (App. lxxvi).

(m) 15 and 16 Vict. c. 27, § 1 (App. ccxv).

(n) *M'Kay v. Ross*, 28 Sept. 1853, 1 Irv. 288.

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what took place during his presence; and that no injustice will be done by his examination.(o) It is no objection to a witness that he has been present by permission of the Court, or with the consent of the opposite party.

7. Oath or Affirmation.—When the witness is adduced he is put upon oath. The ordinary form is always to be used, unless it be made to appear that that form would not be binding on the conscience of the witness. If the witness considers the ordinary form to be binding, it is absurd to ask him if he considers another form to be more binding. Roman Catholics, therefore, are now sworn in the usual way.(p) If any witness refuses or is unwilling, from alleged conscientious motives, to be sworn, it is lawful for the judge to allow him to take a solemn affirmation or declaration.(q) Children under twelve years of age (when admissible) are not sworn. Children above fourteen, in general, are sworn; when they are between twelve and fourteen the judge uses his discretion as to whether they appear to understand the nature of an oath. If they do not, but appear to understand the nature of the obligation to be truthful, they are examined after a due admonition. If the child is so young as not to understand the nature of this obligation, it should not be examined at all.(r)

The words of the usual oath oblige the witness to tell the truth, the whole truth, and nothing but the truth; but either of the two last parts may be omitted. The obligation to tell the truth is an obligation to tell the whole truth, so far as the witness is bound by law to disclose it. Accordingly, a Roman Catholic priest who took an oath to tell the truth, and nothing but the truth, was not thereby held as excused from telling the whole truth, even though the matter which he refused to tell

(o) 3 and 4 Vict. c. 59, § 3 (App. ccxv).

(p) *M'Gavin*, 11 May 1846, Arkley, 67. Jews, it may be added, are sworn with the head covered, and holding the Old Testament between the hands; and

Mahommedans are sworn on the Koran *Dickson on Evidence*, § 1970.

(q) 28 and 29 Vict. c. 9 (App. ccxix)

(r) *Dickson on Evidence*, § 1676.

Examination *in initialibus*—Examination in Chief and in Cross.

had been communicated to him confidentially in the course of his duty.(s) On the other hand, an oath to tell the whole truth does not oblige a witness to disclose matters the knowledge of which he is legally entitled to withhold.

8. *Examination in initialibus*.—The witness, having been sworn, may be examined "*in initialibus*," if the party against whom he is adduced desire it. In this examination the witness is examined as to his relationship to the party adducing him; his interest in the cause; or as to his having acted as agent in it. He may also be asked whether he has been instructed what to say; whether he has received any good deed or promise for what he has to say; or whether he bears malice against the opposite party. When this examination is required, it is conducted by the judge or by the party against whom the witness is called. It is not often used.(t)

9. *Examination in Chief and in Cross*.—The examination in chief then begins. The agent who begins it continues that examination throughout without interruption from any quarter (unless when an objection is taken to the legality of the question) until he exhaust the examination. After this, the agent on the opposite side may cross-examine without interruption until he exhaust his cross-examination. At the same time, he may examine the witness, not only in cross, but *in causa*.(u) Then the agent who examined in chief may re-examine, confining his re-examination strictly to such new matter as may have arisen in cross-examination, unless with permission of the Court.(v) The agent who cross-examined has no right to a second cross, but the Court may either allow him to put any questions proper for clearing up matters which the re-examination may have left in doubt, or, on his suggestion, may put the

(s) *M'Laughlin v. Douglas*, 17 Jan. 1863, 4 Irvine, 273.

(u) 3 and 4 Vict. c. 59, § 4.

(t) *Erak*, 4. 2. 28; 3 and 4 Vict. c. 59, Feb. 1841, § 28.

(v) A. S. (regulating Jury Causes) 16

§ 2 (App. ccxiv).

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what his impression was at the time; but it is only an impression as to a matter of fact that can be asked for. An impression, involving an element of opinion, is worse evidence than the opinion itself, in so far as to take it would be to take the first crude idea which had come into the head of the witness, in circumstances where his deliberate judgment would be rejected. A witness may be allowed, at the discretion of the judge, to make use of notes, made by himself at or about the time the events occurred, to refresh his memory as to details, and such notes often give great additional value to the evidence. (Notes made recently, and still more, notes made with the assistance of the parties or their agents, are inadmissible.)^(b)

11. Witness objecting to Produce or Depone.—When a witness called on to produce documents objects to do so, on the ground of confidentiality, or of his having some right of hypothec over them, or right of property in them, or on any other ground, he must state his objection to the presiding Sheriff, who disposes of it in the first place. When a Sheriff-Substitute decides against the objection, the witness may appeal to the Sheriff. This is done by taking the appeal at the time in open Court, the Sheriff-Substitute making a minute of the occurrence. Upon this being done, so much of the case as is necessary for the disposal of the appeal must be transmitted to the Sheriff. The case, on all points not connected with the appeal, goes on before the Sheriff-Substitute as if the appeal had not been taken.^(c) Refusals to give oral evidence on similar grounds are disposed of as nearly as may be in the same way.

12. Fixing Witnesses' Expenses.—The Sheriff has power to order to the witnesses such expenses as may seem just, which must be paid by the party adducing him, or by his procurator.^(d)

13. Recalling Witnesses.—After a witness has been dismissed

^(b) *Dickson*, § 2005.

^(c) 16 and 17 Vict. c. 80, § 18.

^(d) A. S. 10 July 1839, § 74 (Appx. 1v).

Recording the Evidence—Adjourning Proof.

it used to be incompetent to recall him, excepting where a party who had examined him in cross, desired in the course of his own proof to examine him in chief; but it is now in the discretion of the judge to permit any witness who may have been examined in the course of the proof to be recalled on the motion of either party.(e)

14. Recording the Evidence.—The evidence must be written down by the Sheriff, and it is only when he is unavoidably prevented from doing so that he is at liberty to dictate it to a clerk. The Statute of 1853, which now regulates this matter, directs the Sheriff to take a note of the evidence, in which he is to set forth the witnesses examined, and the testimony given by each.(g) This testimony he is not to record by way of question and answer, but in the form of a narrative. This is not understood to prevent the Sheriff from recording any particular question and answer as they are put, if he thinks it desirable to do so. In his note the Sheriff is also to mention the documents adduced, and any evidence, whether oral or written, tendered and rejected, with the ground of such rejection, and a note of any objections taken to the admission of evidence, whether oral or written, allowed to be received. The note of the evidence of each witness is to be read over to him by the Sheriff, and to be signed by the witness if he can write, on the last page, in open Court, before he is dismissed. It has been recommended that the note should bear who are present to represent the parties. When the note is completed, it is forthwith lodged in the process, after being authenticated by the Sheriff or Sheriff-Clerk.(h) The Sheriff-Clerk marks the documents admitted in evidence, and also separately any documents tendered and rejected.

15. Adjourning Proof.—The Sheriff is prohibited from ad-

(e) 15 and 16 Vict. c. 27, § 4 (App. ccxvii).

(g) 16 and 17 Vict. c. 80, § 10 (App. lxxv).

(h) *Cook v. Duncan*, 2 Dec. 1857, 20 D. 180. The note often mentions, for the guidance of the auditor, the number of hours the proof has lasted.

The Proof.

journing the proof except upon special cause shown, which is to be set forth in the interlocutor making the adjournment. The consent of the parties is not necessarily sufficient cause, though it would be an element in guiding the Sheriff to a conclusion. Some good reason, independent of arrangement between the parties, should be shown to the Sheriff, and must be recorded, before the adjournment can be made. Such reasons may vary indefinitely, but as illustrations may be taken the cases of the absence of a material witness after due citation, and of either of the parties being taken by unavoidable surprise by the evidence led. If the Sheriff grant the adjournment, he may grant it on such conditions as to expenses as he thinks right, the power to grant or refuse implying the power to grant conditionally. The statute does not direct the Sheriff to record a refusal of an adjournment. It is usually done; though probably it was not intended that he should do so. If an adjournment be granted, it is contemplated that it shall be for only the shortest period possible, the Act directing that the proof shall be taken, as nearly as may be, continuously and with as little interval as the circumstances or the justice of the case will admit.(*g*)

16. Declaring Proof closed.—On the proof being concluded, the Sheriff pronounces an interlocutor declaring the proof to be closed.(*k*) The old form of “circumducing” seems inapplicable to the present mode of proceeding. Where documents have been referred to in the course of the proof, but the witness has not had them with him to produce, there seems no objection to introducing, of consent, a reservation empowering the production of the specified documents within a given time. The interlocutor closing the proof generally appoints parties to debate, and the case is then put to the debate roll.

(*g*) 16 and 17 Vict. c. 80, § 4 (App. lxxv).

(*k*) This seems necessary, because, until this is done, there is no opportunity

for disposing of appeals that may have been taken against the admission or rejection of evidence. See 16 and 17 Vict. c. 80, § 17 (App. lxxviii).

 Additional Proof—Proof in Replication.

17. Additional Proof.—After a proof has been regularly concluded, it is incompetent for the Sheriff *ex proprio motu*, or on the mere motion of the parties, to allow additional proof. If additional proof be desired, the mode of applying for it is provided by the Act of Sederunt of 1839. Section 83 provides, that when a proof is reported and an interlocutor pronounced upon it (equivalent under the present forms to the proof being declared closed) no farther proof shall be allowed except upon very weighty reasons shown, and upon payment to the other party of such a sum for expenses as the Sheriff shall determine. This application must be made by a petition, which is particularly to set forth the facts to be proved and the witnesses who are to prove them.(l)

18. Proof in Replication.—In the mode in which proofs are taken under the Act of 1853 it is seldom that the pursuer or defender can have any ground to ask for a proof in replication. But it seems still competent to allow it when a sufficiently strong case for doing so is made out. The party applying for it must show that matters of fact have been brought out which he could not have anticipated. Strictly speaking, proof in replication is the proof which the defender is occasionally allowed to lead in reply to the pursuer's conjunct probation; but the name is also applied to the proof which a pursuer, who has not originally been allowed a conjunct probation, may ask to be allowed to lead in reply to the defender's proof. In any case it is improper to allow proof in replication without strong grounds. It must be specially applied for, and the application should be in writing and should set forth the facts to be proved and the witnesses by whom they are to be proved, in the same way as in an application for additional proof, to which it has much resemblance.(n)

(l) *Drain v. Scott*, 25 Nov. 1864, 3 Macph. 114; A. S. 1839, § 83 (App. lvi). (n) *Strang v. Stewart*, 15 May 1862, 24 D. 955.

 Debate and Judgment.

 Section X.—OF THE DEBATE AND JUDGMENT.

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| 1. <i>Debate.</i>
2. <i>The Judgment.</i>
3. <i>Findings in Fact and Law.</i>
4. <i>Decerniture—Merits.</i> | 5. <i>Decerniture—Expenses.</i>
6. <i>Correction of Error in Interlocutors.</i> |
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1. *Debate.*—The debate follows on the first Court-day after the proof has been declared closed. If necessary, the debate may be adjourned, but it is in the discretion of the Sheriff whether to adjourn it or not. Formerly, when parties absented themselves from a debate, or were present without being prepared for it, the practice was for the Sheriff (when he did not adjourn) to pronounce decree by default. It is a better way to make avizandum, and to dispose of the case as it stands on the papers in the process.^(o) The pronouncing of decree by default often does not advance the case, for the decree may be appealed against, and may be so recalled as to leave the case where it was; whereas, if the Sheriff applies his mind to the case and pronounces judgment on the merits, material progress will have been made, and a party will have himself only to blame for losing his opportunity of giving the Court the benefit of argument on his behalf.

The debate may always be dispensed with on the written consent of both parties.^(p)

The proceedings at the debate are so simple that they require no explanation. In general the pursuer opens, the defender replies; and then the pursuer is allowed to notice any new matter which the defender may have brought forward. He ought to be confined to this; and if he be, the defender is not entitled to a second speech. If the burden of proof or of making out a defence lie on the defender, he may be called on to open, and then the whole order is reversed.

^(o) See *Kennedy v. Watson*, 29 June 1825, 4 S. 125; *Forrester v. Galbraith*, 17 Dec. 1829, 8 S. 266, as to the competency of this course.

^(p) 16 and 17 Vict. c. 80, § 5.

The Judgment—Findings in Fact and Law.

2. The Judgment.—The debate being concluded, the Sheriff takes the case to consider it, makes *avizandum* in the old phraseology, and judgment should be pronounced with the least possible delay.(p) If it is later than ten days in coming, the cause of the delay has to be noted in the Book of Court, which is kept for recording the cases, of which the custody is for the time given up by the Sheriff-Clerk to the Sheriff.(q)

In the judgment several things require attention. If proof have been taken, and the judgment proceed on it, in whole or in part, it must set forth what the Court finds proved in point of fact, and what it holds in point of law. Then the order or decerniture must, in definite language, dispose of the whole conclusions of the action, without going beyond them. The judgment, lastly, must settle the question of expenses. The judgment is authenticated by being signed(r) on each page. Marginal notes are also signed. If words are deleted their number is mentioned before the last signature. There must be no interlineations, and no erasures. If there be any of these, and the judgment thus wants due authentication on any material point, it will be liable to be set aside.

3. Findings in Fact and Law.—The Sheriff's duty to pronounce findings in point of fact, and in point of law is imposed by an Act of Sederunt of 15th February 1851.(s) The rule there laid down had been assumed by some to have been replaced by the provision in the Act of 1853, requiring the Sheriff, in certain cases, to set forth in the interlocutor, or in a note appended to it, the grounds on which he has proceeded. But, on the contrary, it is held to be in force, and cases have been remitted, at great inconvenience to the parties, from the Court of Session to the Sheriff-Courts, to have the provisions of the Act of Sederunt complied with, where they had been neglect-

(p) 16 and 17 Vict. c. 80, § 5.

(r) 1686, § 3; *Smith v. M'Aulay*, 26

(q) 1 and 2 Vict. c. 119, Sch. B. (App. Nov. 1846, 9 D. 190.

xxxvi).

(s) See App. lxix.

 Debate and Judgment.

ed.(t) So important, indeed, is the rule considered, that an objection on the ground of non-compliance with it cannot be waived.(u)

The provisions are—that the Sheriff shall, in any judgment proceeding upon proof, distinctly specify the several facts material to the case which he finds to be established by the proof, and that he shall express how far his judgment proceeds on the matter of fact so found, or on the matter of law, and shall state the several points of law which he means to decide.

4. Decerniture : Merits.—The discerniture varies of course with the circumstances of each case. It must, in the first place, be clear and precise. Though clerical errors may be corrected within a certain short time,(x) it is incompetent after judgment has been issued to make material amendments;(y) and if it be confused and vague, there is no means of curing the defects except by a superior judge setting the judgment aside. A second judgment interpreting the first would be incompetent.

In the next place, the discerniture must keep within the conclusions of the action. If it go beyond them—for instance, by giving decree for a larger sum than that concluded for—it may be set aside. In circumstances where it is competent to conclude alternately for a specified sum, or for such other sum as may be found due, the decree, properly speaking, does not go beyond the summons when it gives more than the specified sum.(z)

The decree must, lastly, dispose of the whole of the conclusions. There are three modes in which this may be done:—(1) by discerning in terms of them (*condemnator*); (2) by assoilzieing the defender from them when he is to be discharged altogether

(t) *Glasgow Gas Light Company v. Glasgow Working Men's Total Abstinence Society*, 11 June 1866, 4 Macph. 1041.

(u) *Melrose v. Spalding*, 25 June 1868, *Journal of Jurisprudence*, vol. xii, p. 490.

(x) See *infra*, Art. 6.

(y) *Cuthill v. Burns*, 20 March 1862, 24 D. 849. In the Court of Session a judgment is held as issued when it has been pronounced from the Bench, though it may not have been signed.

(z) *Spottiswoode v. Hopkirk*, 17 Nov. 1858, 16 D. 59.

Decerniture: Expenses—Correction of Errors in Interlocutors.

(*absolvitor*); or (3) by dismissing them when the Court mean that the present proceedings have failed, but that no opinion is given on the merits. In one or other of these three ways, the whole conclusions must be exhausted. The technical word decern requires to be used in some part of the decree, in order that the judgment may be extracted.(a)

5. Decerniture: Expenses.—At the time when the merits of the cause are disposed of, the Sheriff is directed to determine the matter of expenses in so far as not already settled.(b) If the Sheriff by mistake neglect to do so, the omission may be supplied before extract.(c)

6. Correction of Errors in Interlocutors.—The Statute of 1853 authorises any merely clerical error in a judgment to be corrected by the judge who pronounced it, at any time before the proceedings are transmitted to the Judge or Court of Review, not being later than seven days from the date of such judgment.(d) The agent therefore should examine the interlocutor at once, and apply for the rectification of any clerical error that he may perceive. If such errors be not discovered till after the prescribed time, and the judgment be a final one, it is not clear that there is any remedy in the Sheriff-Court. In the Court of Session, when such a thing occurs, a power is exercised of bringing back the process, even after it has gone to be extracted, and of pronouncing the judgment over again, but it is doubtful whether this could be done in the Sheriff-Court. The Court of Session did it even in a case where the error (an erasure in an unessential part) was so small there could be no doubt that the judgment they recalled (and pronounced of new) was a valid standing judgment.(e) Had the Sheriff-Court possessed any such power, the provision in the Act of 1853 would have been unnecessary.

(a) *Infra*, as to Extracts.

(b) A. S. 1839, § 62.

(c) *Banken v. Kirkwood*, 18 Nov. 1855, 18 D. 81.

(d) 16 and 17 Vict. c. 80, § 20.

(e) *Cadell*, 14 Jan. 1853, 15 D. 282.

Expenses.

Section XI.—OF EXPENSES.

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| <ol style="list-style-type: none"> 1. <i>Of the Right to Expenses.</i> 2. <i>Awarding Interim Expenses.</i> 3. <i>Awarding Final Expenses.</i> 4. <i>Scale of Expenses.</i> 5. <i>Modifying Expenses.</i> 6. <i>Taxation.</i> 7. <i>Accounts of, or against, several Pursuers or Defenders.</i> | <ol style="list-style-type: none"> 8. <i>Objections to Taxation.</i> 9. <i>Decree for Expenses in Agent's name.</i> 10. <i>Agent's right to continue Action for Expenses.</i> 11. <i>Agent's Liability for Expenses.</i> 12. <i>Expense of Taxation and Decree.</i> |
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1. *Of the Right to Expenses.*—The matter of expenses is in the discretion of the Court, a discretion now exercised according to well fixed principles. Formerly, expenses were a penalty of rash litigation. The loser was not liable in them if he had litigated in good faith, and had done no more than was requisite to protect what he reasonably believed to be his rights. The rule now is, that a loser, with whatever good faith, or on whatever good grounds he may have acted, is liable in expenses, because by his litigation the successful party has been put to expense in vindicating or defending his right; and this rule is followed with great rigidity unless some strong special reason is made out for departing from it.^(f) It is questionable whether this principle is not carried out too strictly, and whether rules, such as those prevailing in the English Courts, which would deal less severely with the defeated party, might not be more equitable. But there is no questioning the fact, that the matter of expenses is governed in Scotland almost exclusively by the decision on the merits. So much is this the case, that if the consideration of the merits of the case be withdrawn from the Court by a compromise, the Court will refuse to pronounce any decision in regard to the expenses.^(g)

There are some apparent exceptions to the general rule in regard to expenses, which are little else than the application of the rule to details. If a pursuer, though successful, has asked

^(f) *Kirkpatrick v. Irvine*, 18 Jan. 1848, 10 D. 367. Reversed on merits, but not criticised on the point in question in the House of Lords, 2 Aug. 1850; 7

Bell's Appeal Cases, 186; *Torbet v. Borthwick*, 23 Feb. 1849, 11 D. 694.

^(g) *Dobie v. M'Farlane*, 17 June 1856, 18 D. 1048.

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originally an exorbitant amount, he will not be allowed full expenses.(h) This, however, does not apply to actions of damages in which a random sum is concluded for. There the pursuer gets expenses even though he have got a very much smaller sum than he asked for.(i) In actions of damages for defamation, the pursuer generally gets his expenses, even though he may have got such purely nominal damages as a farthing.(k)

In certain cases a successful pursuer may be subjected in expenses. This happens when he gets less than was tendered to him before the action was raised,(l) or while it was proceeding.(n) A tender cannot be taken into account unless it include the expenses incurred. It should do so expressly, but it may also do so by implication, by offering a sum large enough to cover both them and the sum due.(o) In actions of damages for defamation, a tender to be available must be accompanied by a full retractation.(p) As regards the interest of defenders, it is a general rule, that a tender is of no avail where the pursuer gets more than is tendered.(q)

The right to expenses may be subjected to modification, where a party, successful on the whole, has not been successful in making out, or getting free from, particular claims. Here the strictly accurate (and generally inconvenient) course is to find each party entitled to his expenses in so far as he has been successful;(r) but by modifying the expenses allowed to the

(h) *Smith v. West of Scotland Exchange Investment Co.*, 4 Dec. 1847, 10 D. 214.

(i) *Galloway v. Mackenzie*, 4 Dec. 1860, 33 Jurist, 48. The pursuer asked £500 and got £15 damages for the death of her husband, occasioned through defender's fault.

(k) *Bae v. M'Lay*, 20 Nov. 1852, 15 D. 30. The common law rule has been altered by statute in the Court of Session. See 31 and 32 Vict. c. 100, § 40.

(l) *Rameay v. Souter*, 19 March 1864, 2 Macph. 891.

(n) *Imrie v. M'Whannel*, 21 Jan. 1847, 9 D. 522. In this case the pursuer gets expenses to the date of the tender, and the defender subsequently.

(o) *Aitchison v. Steven*, 24 Nov. 1864, 3 Macph. 81.

(p) *Faulks v. Park*, 22 Dec. 1854, 17 D. 247.

(q) *Per Lord J.-C. Inglis, Webster v. Alexander*, 12 July 1859, 21 D. 1214.

(r) See *Stoppel v. Maclaren*, 18 Dec. 1850, 13 D. 345.

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more successful party, an equally equitable result may be attained with sufficient exactness. And the expenses may also be modified where the successful party has incurred by excessive litigation more expense than was necessary in vindicating or defending his right, either by heaping up unnecessary proceedings *ob majorem cautelam*, or by omitting to plead the legal ground on which he succeeded until expense had been incurred in discussing other grounds.(s)

2. Awarding Interim Expenses.—Interim awards of expenses are made when it is thought desirable to dispose of the expense attending any particular step at the time when it has been occasioned. Thus, expense occasioned to the defender by the pursuer having found it necessary to amend his summons,(t) or by either party having lodged pleadings, or taken steps, not authorised by the regulations as to the forms of process,(u) may be at once decerned for. In the Supreme Court it is the practice to award the expense of discussing dilatory defences at once against the party who has failed; but the Regulations of the Sheriff-Court do not direct the Sheriff to dispose of the matter of expenses except in the case of his sustaining the dilatory defences or any of them, and are indeed so worded as to imply that in the case of his repelling the dilatory defences, he is not to deal with the expenses.(v)

When interim expenses are awarded, there is a small point of form which requires a moment's notice. If the interlocutor expressly "modify" a specified sum as the expenses in question, there is an end to that matter; and though the party who has got these expenses be ultimately successful, he will not be allowed to claim more than he then got, even on showing that the sum modified was really insufficient to cover the expense which was incurred. On the other hand, if a sum be awarded without the use of the word "modify," it is regarded as a sum

(s) *Adam v. Watson*, 19 June 1829,
7 S. 775.

(t) A. S. 1839, § 41.

(u) *Ibid.*, § 65.

(v) A. S. 1839, § 40.

Awarding Final Expenses.

awarded to account, and on the party who gets it being ultimately successful, he will then get any additional expense which the sum awarded may have been insufficient to cover.(x)

An interim award of expenses is generally allowed to be extracted at once. In extreme cases the Court may make it a condition of the party being allowed to proceed with his action, that he shall first pay them.

No repetition of interim expenses is claimable at the end of the action. The party who gets them keeps them, and cannot be required to repay them on being ultimately unsuccessful. Still less can he then be subjected in any part of the other party's expenses connected with the proceeding in question.(y)

3. Awarding Final Expenses.—Final expenses are awarded in the interlocutor disposing of the merits of the cause.(z) They may be awarded though they are not concluded for,(a) and they should always be awarded expressly, for it is held, in contested causes, that a decree in terms of the conclusions of the libel does not include expenses, even when the libel concludes for them.(b) In decrees in absence, expenses follow, when concluded for, as a matter of course. If the interlocutor disposing of the merits be silent as to expenses, and nothing be done to supply the deficiency before the case is brought to an end by extract, it will be held that the Court intended to make no award of expenses; and neither party will be allowed to re-open the question in any future proceeding.(c) If the party who has been awarded expenses extracts the principal decree before having the expenses taxed and decerned for, he is held to pass from his right; for by extracting the decree he has taken his whole case out of Court.(d)

(x) *Cameron v. Muir*, 18 Feb. 1861, 33 J. 272, and 23 D. 535; *Stranford v. Hurlet and Campsie Allom Co.*, 15 Feb. 1861, 33 J. 221.

(y) A. S. 1839, § 108, and also § 107.

(z) *Ante*, sect. x, art. 5, p. 109.

(a) *Ante*, sect. i, art. 6, p. 52.

(b) *Young v. Sinclair*, 21 May 1796, M. 10,053; and *Western Bank v. Buchanan*, 28 Nov. 1865, 4 Macph. 97.

(c) *Clark v. Loos*, 20 Jan. 1855, 17 D. 306.

(d) *Rotheray v. Macnizel*, 17 Dec. 1789, M. 12,188.

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4. **Scale of Expenses.**—If the amount sued for be such as could have been sued for in the Small Debt Court, the pursuer will not be allowed higher expenses than those provided for in it, unless the Sheriff shall be of opinion that the action was one fit to be brought in the Ordinary Court.(e) If the action is of the kind suited to the Ordinary Court, the award of expenses is either a general award of expenses as they may be taxed, or an award containing a direction to tax according to one of the three scales which are in use. The first scale is applicable to causes where the amount of principal and past interest concluded for does not exceed £25; the second, where this amount exceeds that sum but does not exceed £100; and the third, where the amount exceeds £100. The first form of award requires no observation, and the auditor taxes them according to the scale he finds to be applicable. The second form is used when the Sheriff thinks that the scale of taxation ought to be regulated by the amount decerned for, rather than by the amount concluded for.(g) If a direction of this kind be omitted *per incuriam*, it would seem competent to supply the omission before taxation, just as it would be competent to supply a decerniture for expenses omitted *per incuriam*. There is, moreover, nothing in the Act of Sederunt to make it imperative that such a direction should be contained in the interlocutor awarding expenses.

5. **Modifying Expenses.**—The circumstances in which expenses should be modified having already been explained in treating of the right to expenses (art. 1), and the special meaning attached to the word in the case of interim expenses having been noticed (art. 2), there is not much further to be said. The finding that expenses are to be modified must be contained in the interlocutor awarding them. The actual modification usually takes place after the taxation. It may, however, be contained in the original interlocutor, either in the form of saying

(e) 1 Vict. c. 41, § 36 (App. clx).

(g) A. S. 1 March 1861, § 3 (App. ccxxxviii).

Taxation.

that the expenses shall be modified to a certain proportion of the taxed expenses, or by dispensing with the taxation and fixing at once a sum as the expenses due. This latter course is seldom followed, except of consent of both parties, when the amount is small and they are anxious to have an end of it.

6. Taxation.—The account must be taxed before extract, *(h)* and that is done by the Auditor of Court in presence of the parties or their agents. The party entitled to the expenses lodges a copy of his account in process, and serves another upon the opposite party, with an intimation of the diet fixed by the auditor for taxation. It does not appear what amount of notice is requisite for this meeting, but it must be reasonable. The rules for the auditor's guidance will be found in the Acts of Sederunt *(i)* regulating this matter, and the more important only can be noticed here.

The auditor disallows, without express instruction, the expense of all parts or branches of the litigation in which the party has been unsuccessful, or which have been occasioned by his own fault. *(k)* For example, if the pursuer have had to restrict the conclusions of his summons before getting decree, the expense of doing that will not be held to fall within the general expenses to which he may have been found entitled. *(l)* The Court may, however, depart from the rule if it see cause; and parties have been found entitled to the expenses of questions on which they have been unsuccessful, in cases where it has been considered that they should not have been raised by the opposite party. *(n)*

There are certain matters connected with accounts of ex-

(h) A. S. 1839, § 105.

(i) A. S. 10 July 1839, §§ 105-9 (App. lix); and 1 March 1861 (App. ccxxxvii).

(k) A. S. 1839, § 107.

(l) *Flemister v. Milne*, 24 May 1860, 22 D. 1100.

(n) *Cullen v. Smeal*, 8 March 1855, 17 D. 636, where it was held that a defender, who knew that the pursuer had written evidence of the debt, ought not to have pleaded prescription. In regard to the particular application here made, see *Lamond's Trs. v. Merry*, 19 June 1863, 1 Macph. 940.

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penses which are reserved for the Sheriff's decision. Thus, copies of documents made for the agent's use at a debate are to be allowed only in so far as the Sheriff thinks necessary;(o) and charges for papers (according to length) or for attending proofs (according to time) are to be reduced where the Sheriff thinks that the length or time occupied was excessive. When objections founded on these rules are first made before the auditor, he should not dispose of them himself, but should specially notice them in his report.

Outlay is not admitted unless it be duly vouched and sufficient receipts be produced to the auditor. Certain kinds of outlay are specially alluded to in the Acts of Sederunt, but there is no ground for supposing that it was intended that those kinds should be all that should be allowed. On the contrary, it would appear that there is nothing to prevent all just and necessary outlay to which a successful party has been put in conducting his cause from being charged. The rule saying that no other or higher *fees* than those contained in the table are to be allowed, does not apply to *outlay*; and very properly so, because it is impossible to foresee what outlay may be required. To give an example of how injuriously it would operate to disallow outlay not specially alluded to, the case of witnesses preparing themselves to give evidence may be taken. Where work has been done, and a question arises as to its sufficiency, the evidence of practical witnesses would be of no use unless they had seen it, and if it is at a distance, they must go and examine it before coming to the Court. But expense incurred for this is not specially mentioned, and though so indispensable that a party who neglected it would lose his action, it could not be allowed if the table were read as enumerative of the kinds of permissible outlay.(p)

The fees payable to the Sheriff-Clerk, as the fees of Court, form part of the recoverable outlay. Those fees are fixed by

(o) Sometimes the Sheriff's opinion is asked before the copies are made.

(p) In the Court of Session there are

special provisions for the allowance of such expense, A.S. 10 July 1844; *Stobo v. Brown*, 21 June 1865, 8 Macph. 980.

Accounts against several Pursuers or Defenders.

the Sheriff-Court Act of 1838,(g) for all Sheriff-Clerks appointed subsequent to its date; and for all other Sheriff-Clerks, are fixed by special tables. Fees to counsel are not allowed unless the Sheriff shall have either authorised or subsequently approved of their employment. Though both parties should employ counsel, this authority or approval is necessary, and care must be taken to procure it before the case is appealed from the Sheriff-Court, because, if it have not been asked for, the omission cannot be supplied in the Higher Court, and the charge will be disallowed.(r) No other or higher fees are allowed than those set forth in the table. This rule is strictly enforced. As already pointed out, it does not apply to outlay as distinguished from professional charges.

The last rule which it is of consequence to notice specially is, that the auditor not only cuts off irregular or over stated charges, but adds omitted charges, and increases understated charges, to their proper amount. This rule is founded on equity. By applying it, the audit may have the effect of increasing the account to an amount larger than that at which it was rendered.(s)

7. Accounts against several Pursuers or Defenders.—Where there are several pursuers, as they must have a joint interest, so they must unite in employing one agent. If they do not, that is their own affair, and the expense of employing more than one agent is not allowed against the defender. Where there are several defenders having the same interest, they cannot recover the expense of employing more than one agent. If they cannot agree upon one that is their misfortune, and though they should be successful they will only recover from the pursuer the expense of a consultation at the commencement of the action, and of a joint defence thereafter.(t) On the other hand,

(g) 1 and 2 Vict., c. 119, § 28, and schedule (App. xxx and xxxvi).

(r) *Hunt v. Rutherford*, 20 Jan. 1855, 17 D. 305.

(s) *Reeve v. Dykes*, 21 May 1829, 7 S. 632.

(t) *Edinburgh and Glasgow Railway Co. v. Arthur*, 24 Feb. 1858, 20 D. 677.

Expenses.

if they be unsuccessful, the pursuer will be entitled to payment from them of the additional expense which their employment of separate agents has occasioned to him. Where several defenders have separate or conflicting interests, they may employ separate agents, and each will recover his expenses from the pursuer. If, however, they do employ one agent, that agent will not be allowed, on gaining the case, to charge more than once for what was for the common good of the defenders, together with the additional cost occasioned by the defenders being more than one in number.(u)

Where there are several defenders, each pursued for a different debt (in the manner still competent though little practised), full charges for writings are allowed only for the highest of the sums sued for, and one-fourth of the ordinary fees is allowed on each of the other sums. The whole amount is then apportioned among the different defenders according to the debts for which they are respectively sued.(v)

8. Objections to Taxation.—On concluding the taxation, the auditor makes a report (at the end of the account) stating the sum at which he has taxed the account, as well as any special matters which he thinks it necessary to bring before the Court. Within forty-eight hours after the taxation it is competent for either party to lodge objections to it. These objections must be stated specifically. The Act of Sederunt of 1839 (§ 109) directs the Sheriff to dispose of them, either with or without answers. Oral argument was not in use at the time of the Act of Sederunt; and though there is a subsequent regulation which prevents the ordering of answers,(x) there is no regulation directing the Sheriff to order argument on such a matter, and he would, therefore, not do so unless he deemed it necessary.

9. Decree for Expenses;—in Agent's Name.—If no objections are lodged to the auditor's report, decree for expenses passes as

(u) *Greenhill v. Gladstone*, 7 June 1861, 28 D. 1006.

(v) A. S. 1 March 1861, § 10.

(x) 16 and 17 Vict. c. 80, § 12.

Agent's Right to continue Action for Expenses.

a matter of course on the party entitled to them enrolling the case for that purpose. It is competent for the Sheriff (if he see cause), on the application of the agent who conducted the suit, to allow the decree for expenses to go out and be extracted in name of such agent.(y) The effect of this is to make the expenses payable to the agent, and not to the party. It is frequently done with the view of avoiding claims of compensation which the losing can make against the successful party, but cannot make against his agent.(z) An agent taking decree in his own name, and getting payment, has to remember that if the decree be recalled at a subsequent stage of the litigation he will be personally liable in repayment.(a)

10. Agent's right to continue Action for Expenses.—After an interlocutor has been pronounced, either expressly or virtually deciding the question of expenses, the parties cannot enter into a compromise in such a way as to deprive the successful agent of his right to recover expenses.(b) If they make any such compromise, the agent is nevertheless entitled to sist himself as a party, and to take up the cause and carry it on to the effect of getting decree for his expenses. In doing this, he takes the risk of the interlocutor finding expenses (if it is not final) being reversed.(c) In general, however, the Court will not allow an agent to go on for expenses unless the interlocutor finding them due was final at the time of the compromise. Where no interlocutor either virtually or expressly finding expenses due has been pronounced, there will be great difficulty in allowing the case to be carried on. To entitle an agent to do so, he must aver collusion between his client and the opposite party, if not also that his own client is unable to pay, and even then the Court will perhaps not permit him.(d)

(y) A. S. 1839, § 106 (App. lix).

Macgregor v. Martin, 12 March 1867

(z) *Miller v. Geile*, 22 June 1848, 10

5 Macph. 583.

D. 1384.

(c) *Hamilton v. Dixon*, 9 July 1824,

(a) *Cormack v. Tod*, 8 June 1845, 7

8 S. 242.

D. 812.

(d) *Murray v. Kyd*, 14 Feb. 1852, 14

(b) *M'Lean v. Auchinvole*, 29 June

D. 501.

1824, 8 S. 190, and cases there cited;

Expenses.

11. Agent's Liability for Expenses.—An agent may render himself personally liable in expenses either by conducting a case without authority or by occasioning expense by his own fault or negligence. Agents therefore require to be careful as to the authority under which they conduct cases.(e) They must be specially careful how they deal with lunatics, and others incapable of giving legal consent. An agent was found liable in expenses when he had opposed, at the request of a person alleged to be imbecile, measures taken to have his property put under guardianship.(g) Cases in which an agent has been found personally liable on the ground of carelessness, are of course all special. One case may be mentioned, that of an agent who made a mistake in intimating the hour of an examination, in consequence of which certain parties were not present and a decree was pronounced in their absence.(h)

12. Expense of Taxation and Decree.—As a general rule, the party liable for the account pays the expense of taxation. If the amount struck off be excessive, the expense of taxing may however be laid on the party entitled to the account. There is no rule as to fixing the amount which must be struck off before this is done, but the understood practice in the Court of Session is, that the losing party pays the expense of taxing unless a fifth or thereby of the amount of the account is struck off.(i) In England the rule is, that the creditor pays the cost of taxing if more than a sixth of the bill be taxed off.(k)

The cost of obtaining the approval of the auditor's report and the decree for expenses is also paid by the losing party. Where he desires to avoid this, he must tender the amount of the expenses incurred previously.(l) This tender must include

(e) *Phillip v. Gordon*, 5 Dec. 1848, 11 D. 175.

(g) *McCall v. Sharp*, 31 Jan. 1862, 24 D. 393.

(h) *McKechnie v. Halliday*, 23 Feb. 1856, 18 D. 659.

(i) See *Cameron v. Chapman*, 18 Nov. 1858, 14 S. 24; and *Hogg v. Balfour*, 11 Feb. 1835, 13 S. 451.

(k) Paterson's Compendium of English and Scotch Law, 2d ed., sec. 1222.

(l) *Allan v. Allan's Trustees*, 1 July 1851, 13 D. 1270.

 Acts Regulating the Poor's Roll.

the expense of extracting the principal decree, as the successful party is entitled to have an extract, even though his expenses be paid.⁽ⁿ⁾

 CHAPTER III.

 ORDINARY ACTION—OCCASIONAL PROCEEDINGS.

SECTIONS

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| I. THE POOR'S ROLL. | V. ABANDONING, CONJOINING, OR
SISTING ACTIONS. |
| II. SECURITIES FOR THE SUM SUE
FOR, OR FOR THE EXPENSES. | VI. OCCASIONAL PROCEEDINGS IN
THE WAY OF PROOF. |
| III. SISTING OR CALLING NEW
PARTIES. | VII. REMEDIES AGAINST DELAY. |
| IV. AMENDING OR ADDING TO THE
PLEADINGS. | VIII. INTERIM DECREES. |
| | IX. JUDICIAL REFERENCES. |
| | X. THE REFERENCE TO OATH. |

Hitherto we have supposed the steps of the process to follow each other in the order of time, and in their usual or normal course. There are, in addition to those steps, a number of other proceedings which may be taken at any time that the necessity for them arises. These we propose now to consider, grouping them, as satisfactorily as their varied description may permit, according to the nature of the result sought to be attained.

 Section I.—OF THE POOR'S ROLL.

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| 1. <i>Acts regulating the Poor's Roll.</i> | 6. <i>Petition for Admission.</i> |
| 2. <i>The Poor's Agents.</i> | 7. <i>Remit to Poor's Agents and In-</i>
<i>quiry.</i> |
| 3. <i>Who entitled to benefit of Poor's</i>
<i>Roll.</i> | 8. <i>Report by Poor's Agents.</i> |
| 4. <i>Mode of Admission to Poor's Roll.</i> | 9. <i>Effect of Admission.</i> |
| 5. <i>Certificate of Poverty.</i> | 10. <i>Striking Party off Poor's Roll.</i> |

1. Acts Regulating the Poor's Roll.—An ancient Act of Parliament considerably provides for the appointment of advisers

(n) *Scott v. North British Railway*, 28 Feb. 1860, 22 D. 922.

 Poor's Roll.

to act gratuitously on behalf of persons who are too poor to be able to conduct causes at their own costs.(a) This Act is in force; and the detailed regulations necessary for carrying it into effect in as far as regards the Sheriff-Courts are now contained in the Act of Sederunt of 1839.(b) In the Court of Session the matter is regulated by various Acts of Sederunt,(c) and as most of the cases in the books have been decided with reference to them, it is necessary to keep in view that they are much more complicated than the Sheriff-Court regulations.(d)

2. The Poor's Agents.—The Act of Sederunt (§ 134) directs the procurators annually to appoint one or more of their number to act as procurators for the poor. This appointment has to be approved of by the Sheriff; but it is not intended that he should make such an arbitrary exercise of his power as would place the appointment to any extent in his hands. He must approve, or have good reason for declining to approve.(e) A poor's agent holds his unremunerative office for a year, and after its lapse continues to act to the final issue of such causes as may have been assigned to him in the course of it. It is matter of regulation (§ 135) that only an appointed poor's agent shall act on behalf of a litigant who sues on or is sued in *forma pauperis*. The poor's agents are not expected to give their clients more than the benefit of their professional services. It is therefore (§ 136) in the power of the Sheriff, on cause shown, to relieve a poor's agent from the ordinary liability of a procurator to pay the expenses of witnesses whom he has caused to be cited.

3. Who Entitled to Benefit of Poor's Roll.—The persons en-

(a) 1424, c. 45.

(b) A. S. 10 July 1839, §§ 134–136 (App. lxiv).

(c) A. S. 10 Aug. 1784, 11 July 1800, 16 June 1819, and 21 Dec. 1842.

(d) A comprehensive treatise on the poor's roll of the Court of Session will be

found in Chap. 18 of Duncan's *Parochial Ecclesiastical Law*.

(e) *Colquhoun v. Paterson*, 8 March 1850, 12 D. 851. In this case it was held a good reason for disapproving that the person appointed poor's agent resided twenty miles from the Court.

Mode of Admission to Poor's Roll—Certificate of Poverty.

titled to the benefit of the services of the poor's agent are described in the regulations as persons who are "not possessed of funds for paying the expense" of suing or defending the action. This description is a pretty wide one, and it was perhaps difficult to make it more specific. The question whether an individual falls within it, depends partly on his circumstances and partly on the nature of the action in prospect. It is an error to suppose that the poor's roll is intended for all persons in the lower ranks of life. It is meant only for those who, in consequence of poverty, are not able to meet the expense of litigation. It is not enough that it be inconvenient for a person to meet such expenses. The person must be in such circumstances that it would amount to something like a denial of justice if he were not allowed to have the benefit of the poor's roll.(g)

4. Mode of Admission to Poor's Roll.—A person desirous of obtaining the benefit of the poor's roll gets a certificate, in the way mentioned in the following article, that he is not possessed of funds for paying the expense of the action. He then applies by a petition, which the Sheriff remits to the procurators for the poor, who hear parties and report whether, in their opinion, the petitioner has a "*probabilis causa litigandi*." On considering this report the Sheriff disposes summarily of the petition.(h)

5. Certificate of Poverty.—The certificate of poverty may be granted either by the minister of the applicant's parish; by the heritor on whose lands he resides; or by two elders. The minister may be that of either of the civil or of the *quoad sacra* parish;(i).and the minister of the latter is to be preferred as being more likely to know the circumstances. The certificate

(g) See *Walker v. Brown*, 3 Feb. 1860, 22 D. 679, the cases there cited, and the Digest of Cases, *voce* Poor's Roll.

(h) A. S. § 185 (App. lxiv).

(i) *Murrie v. M'Donald*, 24 Dec. 1853, 16 D. 325.

 Poor's Roll.

cannot be granted by a dissenting minister.(k) It is to be inferred, though it is not said, that the elders are to be of the parish where the applicant resides. It is enough if they be acting elders without inquiring too minutely whether they have been ordained.(l)

The terms of the certificate of poverty should be that it consists with the personal knowledge of those who grant it that the person prosecuted, or who means to bring the action, is not possessed of funds for paying the expense thereof. The person applied to is not at liberty to refuse a certificate because he is unable to give one in the required terms: in that case he must give one setting forth what are the circumstances of the applicant to the best of his knowledge and belief.(n) The person applied to has no right to take into consideration the merits of the proposed action or defence, or to consider whether the applicant ought or ought not to proceed with the case. If he altogether refuse a certificate, he may be cited before the Sheriff to give evidence as to the applicant's circumstances;(o) and in extreme cases he may even be subjected in the expenses which his non-fulfilment of the duties imposed by the Act of Sederunt have occasioned.(p)

When the case occurs of none of the specified persons being in a position to issue a certificate, equivalents may be admitted. The Court of Session have held the fact of the party being in receipt of permanent poor relief to be sufficient evidence of poverty.(q) In other cases they have remitted to the Sheriff(r) to inquire; and in a recent case they remitted to a Justice of Peace resident in the parish.(s)

(k) *Elphinstone*, 11 Feb. 1836, 14 S. 463.

(l) *MacIntyre*, 17 Feb. 1830, 8 S. 549; *A B v. C D*, 26 Nov. 1833, 12 S. 127.

(n) See cases quoted in next note, and *Dickson*, 15 Jan. 1862, 14 D. 330.

(o) *Glass*, 7 March 1833, 11 S. 543; *Smith*, 8 July 1834, 12 S. 890.

(p) *Morris v. Greig*, 10 July 1835, 13 S. 1092.

(q) *Muir*, 6 Feb. 1849, 11 D. 517.

(r) *Thomson*, 21 Jan. 1829, 7 S. 301; *A B*, 20 Jan. 1831, 9 S. 808; *A B*, 30 June 1836, 14 S. 1040.

(s) *Stewart*, 8 Dec. 1853, 16 D. 164.

Petition for Admission—Remit to Poor's Agents, and Inquiry—Report.

6. **Petition for Admission.**—The petition for admission sets forth what is the nature of the action to be sued or defended, (t) and craves admission to the poor's roll. Where the applicant is a pupil, or under guardianship, the application must be made with consent of the tutor or curator, if there be any. If there be none, the Court will first of all appoint a tutor (u) or curator (v) *ad litem*, as the case may be, and will then deal with the petition.

If the certificate accompanying the petition be in the requisite terms, the Sheriff will at once remit to the procurators for the poor. If the certificate be special, the Sheriff will have to determine whether the circumstances are such as to entitle the applicant to admission; and to enable him to do this, he may (if necessary) order farther inquiry. If the petition be presented without a certificate, the reasons for its absence must be stated; and if they are sufficient, the Sheriff will take some such means as those taken in the Court of Session for ascertaining the applicant's circumstances.

7. **Remit to Poor's Agents, and Inquiry.**—The procurators for the poor appoint intimation of the petition to be made to the opposite party. (x) This is given by an officer of Court. After hearing parties, and inquiring into the case, they report their opinion whether the petitioner has a *probabilis causa litigandi*. This is the only matter which the Act of Sederunt directs them to take up; but if the respondent impugn the certificate of poverty, it does not appear incompetent for them at the same time to inquire into and report on the grounds on which that is done. This course is taken in the Court of Session, and it is convenient.

8. **Report.**—On considering the report of the procurators for the poor, the Sheriff either grants or refuses the benefit of the

(t) *Duncan*, 28th Jan. 1846, 8 D. 411.(u) *Davidson*, 23 Dec. 1865, 4 Macph. 276.(v) *Rennie*, 28 June 1851, 13 D. 1257.

(x) A. S. § 185.

 Poor's Roll.

poor's roll.(y) The Sheriff has no power to review the decision of the procurators when they report either affirmatively or negatively on the *probabilis causa*.(z) If, however, they differ in opinion, it will be for the Sheriff to decide. The presenting of this report forms the last stage at which the respondent can bring forward an objection on the ground of the applicant not being sufficiently poor, for after the petitioner is admitted the objection is not renewable during the course of the litigation, unless there be some change of circumstances.

9. Effect of Admission.—A person admitted to the poor's roll is not liable in payment of any of the dues of the Court, or fees to the procurator, or to the sheriff-officer who have acted for him, except actual outlay, unless expenses shall be awarded and recovered in the process.(a) A change of circumstances may however render him liable in expenses to his agent and the officer. If the agent recover money in the course of the process he may deduct his expenses from it. This he does in such circumstances whether the pauper has or has not been found entitled to expenses from his opponent.(b) In general, when a pauper succeeds, the opposite party should be found liable in expenses, and it is expressly directed that this shall be done by the Act of 1424.(c) When a pauper lost, it was the practice at one time not to find him liable in expenses to the opposite party, but this practice has been given up; and a pauper is now found liable in expenses to an opponent in the same way as another party would be, and the opponent is allowed to recover them as he best can. This holds good with respect to expenses found

 (y) A. S. § 135.

 (z) *A B v. C D*, 19 Nov. 1833, 12 S. 56; *Irvine*, 22 Dec. 1842, 5 D. 372.

(a) A. S. 1839, § 135.

 There is no regulation in the Sheriff-Court requiring the word *poor* to be affixed to the pauper's name in the titles of pleadings, but it is advisable to do so, that the clerk may know how to deal with the matter of fees.

 (b) *Taylor v. Barr*, 11 March 1841 3 D. 892.

(c) 1424, c. 45. When expenses generally are awarded to a pauper, the expenses of putting him on the poor's roll are not included. This rule is expressly laid down for the Supreme Court (A. S. 21 Dec. 1842, § 15), and the example is followed in the Sheriff-Court.

Striking Party off Poor's Roll.

due by *interim* as well as by final decrees. Thus a pauper is not reponed against a decree in absence or by default on more favourable terms than any other party.(d)

10. Striking Party off Poor's Roll.—The Sheriff may at any time, when he sees cause, deprive a party of the benefit of the poor's roll. This power he may exercise when an end has come either to the *probabilis causa* or to the poverty. Thus, where a tender, *prima facie* sufficient, was made in an action of damages, the pauper who refused was struck off the roll.(e) In like manner, a pauper would be struck off the roll on an accession of wealth removing him from the class for which it is intended. The power to remove is given in terms wide enough to meet any emergency, and would apply to such a case as that of a pauper who abused his privilege by carrying on a litigation in an unnecessarily vexatious manner.(g)

(d) *Ord v. Ord*, 12 Nov. 1861, 24 D. 25 (case in Court of Session), where the matter is regulated by special Act of Sederunt. In the absence of express provisions it is presumed that a Sheriff will hold the example of the Supreme

Court as conclusive in exercising the discretion allowed to him in dealing with expenses.

(e) *A B v. Fraser*, 8 July 1836, 14 S. 1114.

(g) A. S. 1839, § 135 (App. lxiv).

Arrestment in Security.

Section II.—OF OBTAINING SECURITY FOR THE SUM SUED FOR,
OR FOR EXPENSES.

ARRESTMENT IN SECURITY.

1. *Warrant of Arrestment on dependence.*
2. *Time for Arrestment.*
3. *Against whom Arrestment served.*
4. *What Arrestable.*
5. *Return of Arrestment.*
6. *Taking off Arrestments.*
7. *Breach of Arrestment.*
8. *Prescription of Arrestments.*

CONSIGNATION.

9. *When Consignation may be ordered.*
10. *Effect of Consignation.*
11. *Custody and Register of Consigned Money.*

CAUTION FOR EXPENSES.

12. *Discretion to order Caution.*
13. *Pursuer divested of Property and of Interest in Suit.*
14. *Pursuer not divested of Interest in Suit.*
15. *Case of a Defender.*
16. *Amount of Caution.*
17. *When Caution to be Renewed.*

MANDATORIES.

18. *When Mandatory required.*
19. *Equivalents not admitted.*
20. *Want of, must be pleaded.*
21. *How Mandatory sisted.*
22. *Sufficiency of Mandatory.*
23. *Liabilities and Rights.*
24. *Withdrawal of Mandatory.*

The pursuer only is concerned with getting security that the defender will be able to meet the debt if decree is given against him. There are two ways in which he may get this security, one, of pretty extensive applicability—arrestment on the dependence; and the other, of more limited applicability,—getting the consignation of the sum sued for. These two proceedings will form the first subjects of the present section.

Both the pursuer and the defender may be concerned in getting security for the expenses. It will be requisite, therefore, to consider when either may be called on to find caution for expenses. In connection with this subject may be taken the peculiar power which exists, of making a pursuer or defender who does not reside in Scotland find security for expenses by means of sisting a mandatory. It is true that this proceeding has in theory other objects, but practically it has no other legitimate aim, and it may, therefore, be also fittingly included in this section.

Warrant of Arrestment on the Dependence—Time for Arrestment.

ARRESTMENT IN SECURITY.

1. **Warrant of Arrestment on the Dependence.**—Arrestment in security is a means by which a pursuer can prevent a defender from putting away funds, or property which he has in the hands of third parties. The object of it is that the pursuer may be able to get payment of his debt in the event of his succeeding in the action. The pursuer is under no control as to using those arrestments, beyond being liable in damages if he use them wrongly; but on the application of the defender, the arrestments may be recalled by the Court, or be loosed on caution being found, or be restricted in amount. The right to arrest in security is mainly regulated by the Personal Diligence Act (§§ 19 to 22) and the Act of Sederunt of 1839 (§§ 18, and 153 to 156).

The warrant of arrestment may be contained either in the summons (a) or in a separate writ. The latter, called a precept of arrestment, may be issued by the Clerk at any time till the process has ceased to depend before the Sheriff, (b) on there being produced to him a summons (not already containing a warrant of arrestment), or a petition with pecuniary conclusions. (c) The precept must narrate the ground of application for the arrestment, and the Clerk is prohibited from issuing blank precepts on any pretext whatever. When contained in the summons, the warrant is simply to "arrest in security the defender's goods, monies, debts and effects." When contained in a precept, the form is somewhat longer, but the effect is the same.

2. **Time for Arrestment.**—The warrant of arrestment contained in a summons may be served, on the parties who are due money to, or hold property of, the defender, either before or after the service of the summons itself on the defender. If it be served before the summons, the summons must be served within twenty days thereafter, and must be called within twenty

(a) 1 and 2 Vict. c. 114, § 19; 16 and 17 Vict. c. 80, § 1.

and *Glasgow Railway*, 18 July 1856, 4 Macph. 1084.

(b) Compare *Latham v. Edinburgh*

(c) A. S. 10 July 1839, § 153.

Arrestment in Security.

days after the diet of compareance. When the expiry of this period falls within vacation, the summons must be called on the first Court-day thereafter.(d) After the summons has been served, the warrant of arrestment remains available for service so long as the action depends.

Arrestment on a separate precept is generally used when a summons containing no warrant has been served; but it may also be used before the service of a summons, and in that case the summons must be served and called within the same time as when the warrant is contained in the summons itself.

3. Against whom Served.—The warrant of arrestment is served on any of the defender's debtors, or on any one (not being the defender's servant, or other person holding solely as the defender's representative) who has property of the defender in his possession. If the debtor be out of the county, the Sheriff-Clerk of the county where he resides is required to make and date an indorsement on the warrant.(e) It is served in the same manner as a summons, in presence of one witness.(g)

In general, the operation of the law of compensation makes it unnecessary to use arrestment of debts due by the pursuer himself to the defender. There is one case, however, in which a pursuer must, to protect himself, arrest goods in his own hand, viz., under the Mercantile Amendment Act,(h) when he has sold goods to the debtor and the price has not been paid, and he desires to be able to retain them as against subsequent purchasers from the original purchaser.

4. What Arrestable.—A pursuer in the Ordinary Court may arrest in security anything which he might arrest in payment; and when that subject is reached a short notice will be given of what are arrestable debts.

(d) A. S. 1839, § 154. If the first Court-day after the expiry of the twenty days from compareance be one of the vacation Court-days, the summons must be called on it.

(e) A. S. 1839, § 155 (Appx. lxvii).

(g) 9 and 10 Vict. c. 67 (Appx. xv).

(h) 19 and 20 Vict. c. 60. The Act authorises either arrestment or pouding.

 Return of Arrestment—Taking off Arrestments.

5. Return of Arrestment.—The officer executing the warrant of arrestment must forthwith make a return of the execution to the clerk.^(s) The object of this is, that the defender may be in a position to apply at once to have rectified anything which he may have to complain of in regard to its use.

6. Taking off Arrestments.—The defender may present a petition to have the arrestment loosed, or recalled, or restricted.

The application must be made to the Sheriff from whose court the warrant of arrestment has issued.^(k)

Arrestments may be loosed either on general or on special caution. A general loosing takes place when caution is found to make the whole debt sued for (including principal, interest, and expenses) forthcoming on decree being pronounced for it against the defender. This is the kind which is commonly used, as it has the effect of relieving all the arrestments, however numerous they may be. A special loosing is, when the defender merely finds caution to make forthcoming at the proper time the amount of the particular debt or the value of the particular article that has been arrested.

Arrestments may be recalled where they have been used nimiously or oppressively, or without a sufficient warrant. As the power of arrestment in security is a very large power to give to a person alleging himself to be a creditor, and as the remedy given by loosing on caution may often be inconvenient, and even impracticable, Courts exercise a liberal discretion in recalling arrestments, so as to prevent the power of using them from being abused.

Arrestments are restricted where the conclusions of the summons are for random sums, and where the pursuer has arrested more than it is at all likely that he can succeed in obtaining.

7. Breach of Arrestment.—A breach of arrestment occurs when the arrestee, notwithstanding it, makes payment to the

(s) A. S. 1839, § 18 (App. xlvii).

(k) 1 and 2 Vict. c. 114, § 21 (App. xii)

 Ordering Consignation.

defender of the arrested debt, or removes arrested articles. It is not necessarily a contempt of Court.(l) The penalty on an arrestee for breaking an arrestment is being liable in second payment of the arrested debt, and in payment of the damages he may have occasioned. This liability is made good in a separate action.(n) If the arrestee have made payment in ignorance of the arrestment, he is not liable either in second payment or in damages. For example, if the arrestment have been served at the dwelling-house while the arrestee was from home, and he pay in ignorance, he will not be liable.(o)

8. Prescription of Arrestments.—Arrestments in dependence prescribe within three years of the date of obtaining decree in the depending action; or, if the debt be a future one, within three years of its becoming due.(p) The pursuer therefore must, before this time expires, take the necessary steps for appropriating the arrested debts or goods in payment of his debt. These means will be considered when considering the execution which is competent on decrees.

 ORDERING CONSIGNATION.

9. When Consignation may be ordered.—In ordinary actions there is seldom much occasion to consider the competency of ordering consignation. There are two situations, however, where a pursuer is entitled to this security. If the pursuer sue for a debt which is admitted, or clearly shown to be due (such as rent), and the defender claim right to make deductions which are disputed and require to be established (such as damages for not having had the full use of what was let), the Court may in its discretion order such part of the admitted sum to be consigned as it may think fit.(q) Again, if the de-

(l) *Inglis v. Smith*, 26 Jan. 1867, 5 Macph. 320.

(n) *Erakine*, 8, 6, 14.

(o) *Laidlaw v. Smith*, 26 Oct. 1841, 2 Rob. Ap. Ca. 490.

(p) 1669, c. 9; 1 and 2 Vict. c. 114, § 22 (Appx. xii).

(q) *Cumming v. Williamson*, 28 May 1842, 4 D. 1804.

Effect of Consignation—Custody and Register of Consigned Money.

fender admit being due the debt, but challenge the right of the pursuer to sue for it, consignment may be ordered till that question is settled.^(r) The ordering of consignation is in all cases, to a certain extent, matter of discretion; but it must always appear (either by admission or in some other satisfactory manner) that there will be a balance due by the defender.^(s) The Court will not order consignation if it be satisfied that the defender has been prevented by arrestment or other legal obstacle from complying with the order.^(t)

10. Effect of Consignation.—The effect of consignment is to make the money subject to the orders of the Court, and to them only. There is no arrestment or other diligence which can prevent the orders of the Court as to the disposal of the consigned money from being carried out. The interest of any particular litigant, however, in the consigned money may be arrested by his creditors in the hands of the clerk, just as his interest in any other fund may be arrested.^(u) But in such cases special circumstances may bar a particular individual from using arrestment.^(v)

11. Custody and Register of Consigned Money.—By the Act of Sederunt of 27th January 1830—"With regard to consignations, the Lords [of Council and Session] prohibit the Sheriff and Stewart Clerks from retaining in their hands any consignation of money above £10; and declare that they shall be obliged to lodge the same in a bank, at the direction of the Sheriff, within eight days, and shall be responsible for the custody of the banker's note, and be bound to account for interest

(r) *Rolfe v. Drummond*, 12 July 1862, 1 Macph. 39.

(s) *Findlay v. Donaldson*, 8 May 1846, 5 Bell's Ap. Ca. 105. This case also shows that ordering consignment is not to be used as a means for carrying out an interim decree.

(t) *Cowan v. Western Bank*, 26 June 1860, 22 D. 1260.

(u) *Pollock v. Scott*, 9 July 1844, 6 D. 1912.

(v) *Campbell v. Lothians*, 2 Dec. 1858, 21 D. 67. The arrester in this case had asked the consignation, and it had been made under an arrangement which he himself had afterwards broken.

Caution for Expenses.

of the sum deposited in a bank to the person to whom it shall be found to belong; and, that all persons interested may have an opportunity of obtaining complete information as to the monies thus consigned with the clerks, and of claiming such monies, the said Lords direct the Clerks to keep a record of such monies consigned with them, according to the form [prescribed], and that this record shall be patent to all parties interested, or their procurators, without paying any fee whatever."(*x*)

CAUTION FOR EXPENSES.

12. Discretion to order Caution for Expenses.—It will be convenient to take, first, the case of a pursuer, and to inquire in what circumstances he may be ordered to find caution for the expenses of the litigation he is conducting. Unfortunately this will be found to be to some extent a question of circumstances. There is no general rule, but each case is specially determined according to the discretion of the Court.(*y*) This discretion, however, is exercised according to certain principles. There is no case in which a pursuer in ostensibly good circumstances can be required to find caution: the question arises only when a pursuer has fallen into poverty, and here it is necessary to distinguish the two cases of his having been obliged to part with, and of his still retaining, the real interest in the suit.

13. Pursuer divested of Property and of Interest in Suit.—When a pursuer has been divested of his property and of the management of his affairs by having been sequestrated under the Bankruptcy Statutes, or by having become insolvent in the process of *cessio*, or by having granted a private trust for behoof of his creditors, intimation (*z*) of the suit is made to the trustee who has then the substantial interest. If the trustee decline

(*x*) Alexander's Acts of Sederunt (1st series), p. 391. This Act of Sederunt enforces payment into bank only when the sum exceeds £10; but all sums should be so deposited. In Aberdeen sums below £10 are paid into an account cur-

rent, and each entry refers to the relative order of consignment.

(*y*) *Carme v. Manual*, 28 June 1851, 13 D. 1253.

(*z*) There is no special way of making this intimation. It may be by letter.

Pursuer not divested of Interest in Suit.

to come forward and take up the action, the question as to caution arises, and the pursuer will in general be ordered to find it before being allowed to proceed farther with his action.(a) When a trustee who has the power of claiming the benefit of the action for the creditors thinks so little of the merits that he will not do so, there arises a strong presumption against the goodness of the action; and there is no hardship in requiring a man who has no means, and who is suing for what really should belong to his creditors and not to himself, to find security before he drags a defender into expenses. To the general rule, however, exceptions are admitted when there would otherwise be a denial of justice. For example, the Court did not order caution to be found by a party who was suing the very trustee in whose favour he had divested, and certain others closely connected with him, for a slander and assault said to have been committed since the divestiture.(b) The Court also refused to order it in the case of a party suing certain persons whose misconduct, he alleged, had brought about the poverty which had obliged him to divest, and against whom he had shown that he had a probable cause of action by getting himself put upon the poor's roll.(c) There must be legal evidence of divestiture before the Court will order caution.(d)

14. Pursuer not divested of Interest in Suit.—So long as a pursuer has not parted with his interest in the result of the action there will be great difficulty in making him find caution. Though there may have been a general divestiture by him of the rest of his property, if the particular matter at issue still belong to him, he will not in general be made to find caution.(e)

(a) *Bell v. Anderson*, 25 Feb. 1862, 24 D. 606; *Gilchrist v. Proctor*, 25 Nov. 1847, 10 D. 149. It does not matter that the divestiture is in security only; *Walker v. Wedderspoon*, 3 March 1843, 2 Bell's Appeal Cases, 57.

(b) *Heggie v. Heggie*, 6 June 1855, 17 D. 802.

(c) *Weepers v. Pearson*, 21 Jan. 1859, 21 D. 305.

(d) *Macqueen v. Murdoch*, 9 March 1861, 28 D. 726. The Court here refused to take an unstamped deed in favour of a trustee as evidence.

(e) *Bell, supra*, note (a).

Caution for Expenses.

As he has the sole title to the matter in dispute, he ought not to be prevented from making good his right by want of funds. It requires, therefore, a strong case to make it necessary for a party in such a position to find caution. Being imprisoned for debt, even though coupled with bankruptcy, is not sufficient.(g) These are only misfortunes, and the right to the action remains unaffected. But the Court have taken on themselves to exercise the power of ordering caution in certain cases where the kind of claim made was suspicious, and the evidence of poverty at the same time strong. Thus, a pursuer who had set his creditors at defiance by retiring within the precincts of Holyrood, where he could not be apprehended, was not allowed to sue an action of damages for wrongous imprisonment without finding caution. This conclusion, however, was not arrived at without some hesitation.(h) In another case, a pursuer, also in bankrupt circumstances, and who had threatened either to apply for sequestration or to retire to the sanctuary, was made to find caution before he was allowed to sue an action in which, as assignee of another, he proposed to re-open a question already decided against himself.(i) As an exception to the general rule, would also be taken the case of a person who, though not actually divested, had commenced proceedings with a view to doing so.

15. Case of a Defender.—The defender is in a materially different position from the pursuer in regard to this matter of finding caution. There is no practice which will allow a pursuer to call on a defender to find security for expenses in any case in which he has brought the defender into Court.(k) There may, at the same time, be extreme cases in which exceptions might be made and caution required from a defender; for example, if a bankrupt, at a time when he was well and properly

(g) *M'Laren v. King*, 8 Feb. 1834,
6 D. 1260, note.

(h) *July 1844*, 6 D. 1259.

(i) *Maxwell v. Maxwell*, 8 March
1847, 9 D. 797.

(k) *Taylor v. Fairley's Trustees*, 1
March 1833, 6 W. & S. 301.

Amount of Caution—When Caution to be Renewed, &c.

represented by his trustee, should take the case out of the trustee's hands and persist in going on with a vexatious litigation.^(l) It was clearly a waste of time to ask a Court to order caution in the case of a defender who held a judgment of an inferior Court in his favour.⁽ⁿ⁾

16. Amount of Caution.—It was at one time matter for discussion whether a party ordered to find caution should find it for all expenses past or future, but it is now settled that he is bound to find caution for those expenses only which may be incurred after the date of the order.^(o)

17. When Caution to be Renewed.—The cautioner possesses (unless he specially renounce it) the right of retiring at any time, subject to remaining liable for expenses incurred while he held office. Should he exercise this right, new caution must be found. In the same way, if the cautioner become bankrupt, and the caution thus (or in any other way) fail, in a case in which it has been decided that caution is necessary, the party must of new find caution.^(p)

MANDATORIES.

18. When Mandatory Required.—A pursuer or defender not resident in Scotland must, on demand, appoint or sist a "mandatory" to appear on his behalf, and be responsible for the expenses incurred in the process, and for its general conduct. This rule is founded on usage. It applies to all persons, whether Scotchmen who have left Scotland, or Foreigners. So essential has the presence of a mandatory within the kingdom been deemed, that a foreigner has not even been allowed, with-

^(l) *Per curiam* in *Taylor*, quoted preceding note. Contrast *Robertson v. Henderson*, 19 Nov. 1833, 12 S. 70.

⁽ⁿ⁾ *Bell v. Forrest*, 17 July 1848, 2 D. 1460.

^(o) *Ramsay v. Stenhouse*, 11 Dec. 1847, 10 D. 234; and *Maxwell*, *ut supra*, note (i).

^(p) *A B v. C D*, 29 Nov. 1836, 15 S. 158.

Sisting Mandatories.

out sisting one, to appear to plead that he was not liable on any ground to the jurisdiction of the Scotch Courts.(q)

The exceptions recognised to the necessity for sisting a mandatory are few.

The decisions seem to imply that if the absence is to be of short or temporary character,—for example, upon a business journey,—a mandatory is not required. When such absences are frequent, the question is more difficult; and it would come to be a question of circumstances, whether the person could or could not reasonably be said to be resident in Scotland. When, however, such a person has to sist a mandatory, once for all is sufficient, and the mandatory does not require to be resisted on the occasion of each absence.(r) Scotch landed proprietors are not required to sist mandatories when the property is large enough, after allowing for the burdens, to meet any probable expense.(s) But they are not exempt if their title is under reduction.(t) The exemption of landed proprietors is altogether exceptional, and is not to be extended, for example, to the case of a person drawing an annuity from heritable property.(u) A mandatory cannot be insisted for on the absence of one of several parties who sue or defend on a joint title,—for example, where one partner is absent while the firm is suing for a company debt,(v) or where one of several trustees is absent during a litigation about the trust-estate.(x)

If a foreigner come to this country to reside while the litigation is going on, he escapes the necessity for sisting a mandatory.(y) It must be to reside, however, that he comes, and, notwithstanding one case,(z) it is not sufficient that he find

(q) *Rankin v. Nolan*, 26 Feb. 1842, 4 D. 832.

(r) *Scott v. Gillespie*, 29 Jan. 1828, 2 S. 165.

(s) *Caledonian and Dumbartonshire Rail. v. Turner*, 21 Dec. 1849, 12 D. 406; *Fairly v. Elliot*, 19 Jan. 1839, 1 D. 399.

(t) *Sandilands v. Sandilands*, 31 May 1848, 10 D. 1091.

(u) *Smith v. Strathmore*, 31 May 1828, 6 S. 908.

(v) *Antermoney Coal Company v. Wingham*, 7 March 1866, 4 Macph. 544.

(x) *Morrison v. Hutton*, 19 June 1863, 4 Macph. 546.

(y) *Faulks v. Whitehead*, 3 March 1864, 16 D. 718.

(z) *Hopetoun v. Horner*, 5 March 1842, 4 D. 877.

Equivalents not Admitted—Want of Mandatory must be pleaded.

caution to attend the diets of the Court.(a) Foreigners are not exempted on the ground of bankruptcy, although the opposite party may gain somewhat if he get a solvent mandatory instead of an insolvent principal to contend with.(b)

19. Equivalents not Admitted.—No equivalents to the sisting of a mandatory have been admitted. A foreigner whose funds in this country have been arrested is not excused.(c) Even the consignment of a fund to meet expenses will not be taken as a substitute;(d) although there is a case where a motion to have a mandatory sisted was refused, when it was made at a late stage of the litigation, and where the party had a fund *in manibus curiæ* sufficient to meet expenses.(e)

20. Want of Mandatory must be pleaded.—The objection that a mandatory is required must be pleaded, the instance being held good so long as the objection is not stated. The foreigner may raise the action in his own name, and it is enough for him to sist the mandatory when required by the defender. A mandatory, however, is requisite before he can arrest on the dependence,(g) an exception introduced to prevent parties not subject to the jurisdiction of the Scottish Courts doing acts which might lead to damages.(h)

A party otherwise entitled to call for a mandatory may forfeit his right by not attempting to exercise it till the litigation is nearly at an end. In such a case a motion for a mandatory will be refused if there is reason to believe that it is not made *in bona fides*, but for the mere purpose of getting delay.(i) A

(a) *Ballon v. Matthews*, 17 July 1844, 6 D. 1348.

(b) *Overbury v. Peek*, 9 July 1863, 1 Macph. 1058.

(c) *Ranken*, *ut supra*.

(d) *Brown v. Lindley*, 12 Nov. 1833, 12 S. 18.

(e) *Buik v. Pattullo*, 3 March 1855, 17 D. 568.

(g) *Johnston v. Jendwine*, 23 Jan. 1818, F.C.

(h) Whether parties doing diligence must sist mandatories, will be considered in treating of the execution which may follow on a decree

(i) See *Buik*, *supra*.

Sisting Mandatories.

party may forfeit his right in other ways, for example, by raising up a personal exception against himself. If he have imprisoned the opposite party for debt in some foreign country, it has been held he cannot make the absence which he himself enforces a ground for asking a mandatory.^(k) It follows from the principle that the objection must be pleaded, that if the opposite party waive it, the absentee can himself make no use of it, and cannot therefore ask to have the case delayed till he sist a mandatory.

21. How Mandatory sisted.—Where an absentee brings a summons, the general way is for him to sue in the name of the mandatory in addition to his own name. If this be not done, or if the necessity arise on the defender's motion, a mandatory cannot be sisted without an order of Court. When the order is pronounced, the absentee lodges a minute stating the name of his proposed mandatory, and along with the minute a mandate in favour of that person should be produced. This mandate must be either holograph or probative, and it may either be a general mandate ^(l) (of the nature of a factory and commission) or a special mandate. It may be noticed that a factor holding a general mandate cannot name another person as mandatory.⁽ⁿ⁾ In some cases the actual mandate may be dispensed with for a time. It is within the ordinary power of a law agent, when his principal goes unexpectedly abroad, to sist a mandatory for him, so as not to delay the litigation till there is time to communicate with him; ^(o) but in such a case the principal's ratification (if called for) must be produced as early as practicable. In all cases the consent of the proposed mandatory must be obtained. This will be presumed in general from the agent tendering him as such, and appearing on his behalf; but if the agent's right to do so be questioned, the proposed manda-

^(k) *Robertson v. de Salvi*, 14 July 1857, 19 D. 996.

^(l) Compare *Smith v. Harris*, 3 Mar. 1854, 16 D. 727.

⁽ⁿ⁾ *Dempster v. Potts*, 18 Feb. 1836, 14 S. 521.

^(o) *Elder v. Young*, 27 June 1854, 16 D. 1003.

Sufficiency of Mandatory—Liabilities and Rights of Mandatories.

tory's written consent must be produced. When all this has been done, if there be no objection on the ground that the mandatory is insufficient, an interlocutor is pronounced sisting him, and then the matter is complete.

These steps are not all indispensable. If a person acts as mandatory, calls himself by that name, and carries on a process in that character, he makes himself a mandatory. Thus a law agent who designed himself throughout the pleadings as mandatory for his client was not permitted to say on losing the cause that he had never been rightly sisted.(p)

22. Sufficiency of Mandatory.—A mandatory is sufficient when he is solvent, and in the same position in life as the person whom he represents; and it is irrelevant to inquire whether he has funds enough to meet the expenses of the action so long as he is not insolvent.(q) Persons, however, who are insolvent, even though they may not be bankrupt, are not eligible as mandatories even for insolvent persons; and if a mandatory become insolvent during the currency of an action, a new mandatory must be sisted.(r) When an objection to the sufficiency is stated, it is usual to remit to some competent person to inquire into the circumstances of the proposed mandatory, and to act upon his report without allowing proof in a formal manner.

The mandatory must not be already a party to the process, as, for instance, a co-defender.(s)

23. Liabilities and Rights of Mandatories.—The mandatory is liable both for the expenses incurred in the process prior to the time of his becoming mandatory,(t) and for those incurred

(p) *Cullen v. Brown*, 22 May 1860, 22 D. 1090.

(q) *Baillon v. Matthews*, 13 Nov. 1844, 7 D. 105; *M'Kinlay v. M'Kinlay*, 10 March 1849, 11 D. 1022.

(r) *Harker v. Dickson*, 8 March 1856, 18 D. 793.

(s) *Barstow v. Smith*, 6 March 1851, 13 D. 854.

(t) *Pease v. Smith*, 4 June 1822, 1 S. 452; *Renfrew v. Glasgow Mags.*, 7 June 1861, 23 D. 1008.

 Sisting Mandatories.

during the time that he acts.(u) If, however, his principal be on the poor's roll, he does not incur this liability.(v) It would appear to be doubted whether the mandatory of a person who was avowedly bankrupt at the time of sisting necessarily incurs liability for expenses.(x)

Besides being liable for expenses, the mandatory is liable for the proper conduct of the litigation, and must see that the statutory and court regulations are observed; and he may be punished for breaches of these where the principal in the like circumstances would have been liable to punishment. In short, the mandatory has to represent within the jurisdiction the party who is beyond it.(y) The liability, however, for the proper conduct of the litigation is one of no sort of importance, because, when a party is abroad, he has necessarily a law agent to represent him, and his liability in this respect is of a more serious kind.

The mandatory seems to have no rights independent of those of the principal. He has not the power of acting without or against the authority of his principal even in the matters in which he incurs responsibility. It appears that he has no power, analogous to that of a law agent, of carrying on a process after the principal has withdrawn, to the effect of getting a decision that expenses are not due.(z)

The legal liabilities and rights of the mandatory cannot be altered by the act of the parties. The mandatory must be sisted unconditionally, and must accept whatever position the law gives to him.(a)

24. Withdrawal of Mandatory.—The withdrawal of a mandatory should be done by a minute, and an entry of the with-

(u) *Lindsay v. Lindsay*, 8 Feb. 1827, 5 S. 810.

(v) *Middlemas v. Brown*, 9 Feb. 1828, 6 S. 511.

(x) See *Overbury v. Peek*, *supra*, p. 139, note (b).

(y) *Per Deas in Overbury v. Peek*, *supra*.

(z) *Gordon v. Gordon*, 11 Dec. 1823, 2 S. 572.

(a) *Robertson v. Ezley*, 24 Jan. 1833, 11 S. 320.

Sisting or Calling new Parties.

drawal must be made on record.(b) The mandatory may withdraw at any time, and what is equivalent to a withdrawal may be effected also by the death of the mandatory or of the mandant. His liabilities are determined by the date at which he ceases to hold office. The effect of the withdrawal is to oblige the mandant to sist a new mandatory. In the case of the mandant's death, the action is intimated to his representatives; and if they fail to sist themselves, decree may be taken against the mandatory for the expenses.(c) This must be done even though the principal have been successful in so far as the action has gone. If it be not done, decree by default will be given to the other party, and in this case the principal will not be allowed the benefit of any interlocutors pronounced in his favour in the process, except such as have become final.(d)

SECTION III.—OF SISTING OR CALLING NEW PARTIES.

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| 1. <i>Omitted Pursuers.</i>
2. <i>Omitted Defenders.</i>
3. <i>Parties acquiring Interests.</i> | 4. <i>Mode of Sisting or Calling.</i>
5. <i>Time for Sisting or Calling.</i>
6. <i>Effect of Sisting a Party.</i> |
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Sometimes in the course of a process it becomes necessary that new parties should engage in it as pursuers or defenders. This necessity may arise either from causes which were in existence at the date of bringing the action, or from causes which have come into existence during its progress. The situations are materially different, and require separate consideration. The rules in regard to both are in so far in the same category, that they both rest upon case law, and not upon any definite regulations, and that both are governed by the same principles—the main difference being, that more latitude is allowed when

(b) *Martin v. Underwood*, 8 June 1827, 5 S. 783.

(c) *Marshall v. Cannon*, 16 Dec. 1848, 21 Jurist, 68.

(d) *Trodden v. Sweetman*, 16 July 1862, 24 D. 1360; *Robb v. The Independent Middlesex Ins. Co.*, 11 March 1843, 5 D. 1025.

Sisting or Calling New Parties.

parties are called in consequence of circumstances which have come into existence since the date of the summons.

It will be convenient to take, first, the case of parties who might originally have been called as pursuers or defenders, but who have been omitted; and then the case of those who have acquired interest since the beginning of the action.

1. Omitted Pursuers.—When new pursuers (who should have appeared in the summons) are required to make the instance good, there is frequently no objection to the omission being supplied. Thus, if a minor raise an action without the consent of the curators, they may afterwards sist themselves. In like manner, if a wife raise an action with reference to her property in her own name, the husband may sist himself as a pursuer, and as consenting for his interest. So with companies; if the requisite number of individual partners be not named in the summons, they may sist themselves on the objection being pointed out. Omissions of this kind, which are almost accidental omissions, are readily permitted to be amended,—on payment always of any expense which may have been occasioned; and this course is much better than that of throwing out the summons with the prospect of having the action immediately recommenced.

Where all parties interested consent, a very wide margin indeed is given. There is a case where a person was allowed to invert his position. He should have been one of the respondents in a petition, but having come forward as a petitioner, he was allowed, on all parties consenting, to go over to his proper side, and the proceedings went on as if no such mistake had been made.(e)

Where a party, who should have been pursuer, has been omitted because his consent to the proceedings could not be obtained, the question will arise whether it is competent to proceed with the action without him. Such questions arise when a party, who has nominally the right to sue, has divested

(e) *Dalrymple*, 10 Jan. 1862, 24 D. 288.

Omitted Defenders.

himself of interest in favour of some one who prefers not to appear. In such cases it is not, in general, necessary that the party really interested should come forward under the penalty of the action being dismissed, but if he fails to come forward on being required to do so, the defenders can insist that the actual pursuer should find caution for expenses.(g) Where concurrence of the party who has been omitted is necessary to make the instance good, the pursuer must, if the objection be taken, get his consent to being sisted before the action can proceed.

It was at one time held that new pursuers could never be brought into a process without the consent of the defenders. This rule seems to have been applied only to the case of the proposed new pursuers being such as could have been conjoined in the summons, and also such as were independent of the original pursuers, and did not stand to them in any connected relation, like that in which a tutor stands towards his pupil.(h) It seems also to have applied only to cases where the defenders were making no objection to the instance.(i) If the defenders objected, it would hardly be reasonable to refuse to the pursuer the power, under proper conditions, of obviating their objection. Where, however, a defender stated no objection, and was willing to discuss the merits of the case with the party who had called him into Court, new pursuers could not be brought into the action without his consent. It is more than doubtful, however, whether this rule would now be acted on.

2. Omitted Defenders.—New defenders are cited when the pursuer has failed to call all parties interested. This may be necessary when the defender is not *sui juris*, and the pursuer

(g) *Waddel v. Hope*, 2 Dec. 1843, 6 D. 160. Where caution is not offered, the action is dismissed; *Fraser v. Dunbar*, 6 June 1839, 1 D. 882. See the immediately preceding section, art. 18.

(h) See *Fraser v. Duguid*, 9 June 1838, 16 S. 1131, where it was held competent

without defender's consent to sist assignee when objection stated to cedent's title.

(i) *Taylor v. Crawford*, 14 Nov. 1833, 12 S. 39; *Remington v. Bruce*, 2 June 1829, 7 S. 692.

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has omitted to call the person without whose authority the defender is unable to act;(*k*) or where there are others besides those called interested in the action;(*l*) or lastly, where the actual defenders have relief against other parties. In the two first of these situations, the pursuer may be appointed to cite the omitted parties, on his own motion on discovering the omission, or on that of the defender,(*n*) or *ex proprio motu* of the judge;(*o*) or the parties interested may voluntarily apply for leave to appear.(*p*) The pursuer, however, cannot be obliged to call parties against whom the defenders have right of relief,(*q*) or even to consent to their admission into the process.(*r*) He is bound to discuss the questions at issue only with those who are responsible to him, leaving the defenders to make the best arrangements they can for their relief.

3. Parties acquiring Interests.—New parties are very frequently required in consequence of changes occurring in the course of the process. Thus, if the pursuer or defender die, his general executors,(*s*) or his successors in the immediate matter at issue,(*t*) may be made parties to the suit; or may make themselves parties to it, and that whether the opposite party consent or not. The right, however, is confined to persons who have a title of this kind. A person who has an independent right to sue can-

(*k*) *Thomson v. Livingston*, 14 Nov. 1863, 2 Macph. 114.

(*l*) *Thomson v. Gilkison*, 1 Mar. 1831, 9 S. 520 (partners who should have been called cited by supplementary summons); *Geddes v. Hopkirk*, 2 June 1827, 5 S. 747 (to the same effect).

(*n*) If the pursuer call them on defender's motion, and they be assolvied with expenses, the pursuers may, in the same action, obtain decree against the defender for those expenses; *Sym v. Charles*, 13 May 1830, 8 S. 741.

(*o*) *Laird's Assignees v. Murray's Trustees*, 24 Nov. 1836, 15 S. 120.

(*p*) *Butchard v. Prophet*, 18 June 1841, 8 D. 1040.

(*q*) *Binny v. Mackray*, 18 July 1848, 10 D. 1508, where it was observed that the defenders might protect themselves by giving notice to the other parties.

(*r*) See opinions in *Wishart v. Motherwell's Trustees*, 12 June 1851, 18 D. 1101.

(*s*) *Neilson v. Rodger*, 24 Dec. 1853, 16 D. 325; *McCulloch v. Hannay*, 24 Nov. 1829, 8 S. 123.

(*t*) *Duff*, 22 Nov. 1862, 1 Macph. 49; *Kyle v. Kyle's Trustees*, 30 Nov. 1821, 1 S. 193.

Mode of Sisting or Calling.

not take up the action; (u) nor can a person do so who merely alleges a title, but who has not produced or established one. (v)

Where a party assigns his interests in the course of an action, the assignee may in general be sisted. Such assignments are either special, or of the general kind involved in sequestration or marriage. If the assignation be special, the assignee must appear; otherwise the cedent will be ordered to find caution. (x) It is the same with the trustee in a bankruptcy. (y) But in marriage, if the action be carried by it and the husband does not come forward when properly called, the title of the wife to sue or defend, as the case may be, falls.

New parties are sometimes required where the original party has had merely a temporary interest, which has ceased. For example, a landlord may appear at the end of a lease to carry on a defence against an action as to a question of possession which the tenant had abandoned on account of ceasing to have any interest. (z)

4. Mode of Sisting or Calling.—The usual method of sisting parties is by a minute being lodged for them, and by an order being pronounced thereon, sisting them in the desired capacity. This is the only way in which pursuers are sisted. It is also very frequently followed in the case of defenders. It is the way new defenders must take when they themselves desire to appear; and even when their appearance is wanted by the other parties, they frequently agree to take that course on the action being intimated to them. When the persons wanted as defenders are unwilling to take that course, the pursuer must raise a supplementary summons. This summons concludes simply that the new defenders shall be called as defenders to the original action, and when it comes into Court the cases are

(u) *Dobbie v. Gaff*, 18 June 1843, 5 D. 1385. Person who had disbursed aliment not allowed to appear on claimant's death.

(v) *Geikie v. Hutchison*, 12 Jan. 1848, 10 D. 854.

(x) See *ante*, art. 2, note (x).

(y) See Kinnear on Bankruptcy, 2d ed. pp. 124, 251, and authorities there cited.

(z) *Douglas v. Dalhousie*, 15 Nov. 1811 F.C.

Sisting or Calling New Parties.

conjoined.(a) When executors refuse to appear on intimation, the supplementary summons is called one of transference. It is in no case advisable to dispense with one or other of the minute or supplementary summons. When the appropriate one of these is used, there seems no necessity for an amendment of the original summons; but if the record be not closed, the titles of the pleadings are altered so as to include all the parties, and subsequent pleadings appear in the name of all.

A formal sist may sometimes be dispensed with. If a party appear in a process in room of another, discuss the process and obtain a decision on it, he will not be allowed, when it comes to the question of expenses, to say that he never was properly sisted.(b) In this case there can be no doubt of the party being barred from stating such an objection. What will be enough for that purpose must be a question of circumstances; but not much seems to be required, if the opinion that has been expressed be sound, that an appearance to ask a proof to be taken to lie *in retentis* was equivalent to a sist.(c)

Parties cannot be sisted conditionally. As in the case of mandatories, the parties sisted must be prepared to take all the responsibilities which the step itself involves. A minute craving that a party might be sisted, but adding a condition that he was to come under no liability for previously incurred expenses, was rejected.(d)

5. Time for Sisting or Calling.—The proper time for sisting or calling a party who might have been originally included among the pursuers or defenders is before the record is closed. It does not seem absolutely incompetent, however, to do so after the record is closed, but instances of its being done are certainly uncommon, and the course is so inconvenient, as involv-

(a) *Bryson v. Muir*, 23 Nov. 1841, 4 D. 58.

(b) *Gill v. Anderson*, 12 May 1859, 21 D. 728; and see *ante*, p. 142, as to sisting mandatories.

(c) *Cameron v. Gordon*, 16 Feb. 1880, 8 S. 588.

(d) *Wallace v. Eglinton*, 2 March 1886, 14 S. 599.

Effect of Sisting a Party.

ing the necessity for opening up the record (which the Sheriff-Substitute cannot do), that special reason will always have to be shown for it.

6. **Effect of Sisting a Party.**—When a party has been sisted, in whatever way it may have been done, he becomes to all intents and purposes a party in the same way as if he had been specially designed in the summons. Where he has been sisted in room of another, he is entitled to maintain all the pleas, and is liable to all the objections which could have been stated by, or used against, his predecessor.(e) If the opposite party is to maintain, either that the party proposed to be sisted is not entitled to the rights of the original party, or is subject to farther objections, he must state his pleas on those points before the party is sisted, and must have them disposed of or reserved by the interlocutor sisting. Unless they be stated before the sist, and then either disposed of or expressly reserved, the Court will not afterwards listen to them.(g)

Section IV.—OF AMENDING OR ADDING TO THE PLEADINGS.

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| <ol style="list-style-type: none"> 1. <i>Amendments of the Summons—Acts Regulating.</i> 2. <i>General Principles.</i> 3. <i>Amendments of the Conclusions.</i> 4. <i>Restricting Conclusions.</i> 5. <i>Adding to the Grounds of Action.</i> 6. <i>Abandoning Grounds of Action.</i> 7. <i>Changing the Grounds of Action.</i> 8. <i>Time of making Amendments.</i> 9. <i>Second Amendments.</i> 10. <i>Mode of Amendment.</i> | <ol style="list-style-type: none"> 11. <i>Dispensing with Amendment.</i> 12. <i>Acquiescing in Amendment.</i> 13. <i>Amending the Closed Record.</i> 14. <i>Making Statements Specific and Correcting Errors.</i> 15. <i>Appointments to confess or deny.</i> 16. <i>Ordering Statements of Accounts.</i> 17. <i>Res noviter veniens ad notitiam.</i> 18. <i>Time for stating res noviter.</i> 19. <i>Mode of stating res noviter.</i> |
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It is a matter of importance to know what powers exist at various stages for amending or adding to the pleadings. The rules requiring all the grounds of action, and all the remedies

(e) *Watt v. Scottish North Eastern Railway Co.*, 20 Jan. 1866, 4 Macph. 320.

(g) See opinions in *Campbell v. Campbell*, 14 Jan. 1865, 3 Macph. 360.

Amending or Adding to the Pleadings.

claimed to appear in the summons, render it of peculiar importance to know when and in what respects the summons may be amended. With regard to the other pleadings, so long as the record is unclosed, they are not held to be finally settled; and we have already seen what powers exist as to revising and adjusting them. On closing the record, the powers of the Sheriff-Substitute to permit alterations on any of the pleadings come to an end; and the only way now of effecting alterations is to get the case carried by appeal to the Sheriff, who can then open up the record, and exercise all powers of alterations which would have existed had the record not been closed. There are certain things, however, not properly of the nature of alterations, which the Sheriff-Substitute may order or permit, notwithstanding the closing of the record. Thus, if a statement be wanting in specification, or be ambiguous, he may order a minute to be given in making it specific, or explaining its meaning; if there be obvious errors, he may allow them to be corrected; if accounts be wanted, he may order parties to give in statements of them; and if one party have not fairly met the allegations of the other, he may be appointed to give in a minute distinctly confessing or denying them. Lastly, if new matter comes to the knowledge of one or other of the parties after the closing of the record, the Sheriff-Substitute may permit its addition. The rules under which these various things are done form the subject of the present section.

1. Amendment of the Summons—Acts Regulating.—The amending of the summons is chiefly regulated by sections 11, 13, 41, 56, and 99 of the Act of Sederunt of 1839. Section 11 provides that no summons is to be amended after citation without leave of the Sheriff. Section 13 applies to the intimation of amendments made in absence. Section 41 provides, that if it appears to the Sheriff, after the dilatory defences have been disposed of, "that the grounds of action on the merits, as set forth in the summons, are in terms not sufficiently positive and clear, or that the conclusions are not regularly or

General Remarks.

clearly deduced," he may either dismiss the action, or allow an amendment of the summons.(h) Section 56 of the Act of Sedes-runt provides that, when the record has been closed, "no new averments of fact, amendment of the libel,(i) or new ground of defence," shall be allowed or received.(k) Section 99 modifies the rigour of this provision by making it competent for the Sheriff, when the case is before him on appeal on any point, to open up the record *ex proprio motu* if it shall appear to him not to have been properly made up. This provision is repeated verbatim in section 16 of the Act of 1853.

2. General Principles.—The preceding provisions are not to be considered as giving the power to amend the summons, but as regulating and controlling it. The practice prior to them was more liberal in allowing amendments, but it is needless to go into the old rules of the common law. It is enough to state the general principles on which the matter now stands, and these may thus be summed up:—

(1) The pursuer has no right to insist on making an amendment, but it is in the discretion of the judge to give or refuse it; and that on such terms as to expenses as he thinks right.(l)

(2) Amendments are altogether incompetent after closing the record, unless the Sheriff-Depute, when the case comes before him on appeal, sees fit to open up the record.

(3) There may be amended conclusions, or amended grounds of conclusion, provided the substantial cause of action remains unchanged.(n)

(h) This section makes applicable to the Sheriff-Court provisions resembling those which section 6 of the Judicature Act applied to the Court of Session.

(i) Throughout the regulations, and in most of the cases, it will be found that the summons, in this connection, is usually called the "libel;" but there seems no object in keeping up two names for the same thing.

(k) This provision was taken from § 10 of the Judicature Act.

(l) See this discretion exercised in refusing a competent amendment in *Henderson v. Minto*, 1 June 1860, 22 D. 1126.

(n) *Per Mackenzie in Gray v. Sutherland*, 11 March 1847, 9 D. 928.

Amending or Adding to the Pleadings.

(4) No change, altering the summons in any matter which is of the essence of the action, whether in the averment of what is an essential quality, or what is a proper ground of action, can be made otherwise than by an amendment on leave obtained.(o)

With this explanation of the general principles, the matter may now be examined in detail.

3. **Amendments of the Conclusions.**—There is little room for any amendment on the conclusions. If the conclusions be not clearly deduced, the summons may be amended to the effect of making it clear,(p) but farther amendments can hardly be made. It is clear that if the summons be so carelessly drawn as to omit the conclusion altogether, the defect cannot be supplied.(q) Neither can the conclusion be altered so as to conclude for a larger sum than that at first sought, nor can a summons containing one conclusion have another added. Thus, where a summons concludes for principal, it would appear to be incompetent to add a conclusion for interest.(r) The principle underlying these rules seems to be that a party cannot, in the course of the proceedings, ask a larger remedy than that of which he gave the defender notice on entering the Court.

4. **Restricting Conclusions.**—But while more cannot be asked than what the summons asked originally, it is competent to ask less, and either to restrict a conclusion or to abandon it entirely.(s) Even this, however, cannot be done if the conclusions are all so bound up together that the effect of giving up a part will be to change the character of the whole.(t)

5. **Adding to the Grounds of Action.**—The strict rules of

(o) *Per curiam, Dallas v. Mann*, 14 June 1858, 15 D. 746.

(p) A. S. 1839, § 41.

(q) *Davidson v. Burntisland Mag.*, 8 Dec. 1836, 15 S. 226.

(r) See *Edinburgh and Glasgow Union*

Canal Co. v. Carmichael, 27 May 1842, 1 Bell's Ap. Ca. 338.

(s) *Mackenzie v. Young*, 21 Jan. 1859, 21 D. 304.

(t) *Blair v. Steele*, 1 June 1848, 10 D. 1095.

Adding to the Grounds of Action.

pleading seem to preclude the addition at any stage or in any way of an entirely new ground of action from that stated in the summons.(u) There are indeed no regulations which expressly forbid the addition of such new grounds, before the record has been closed, but the tenor of the regulations clearly imply its incompetency, and the practice is conclusively to the same effect. Thus, an action concluding for damages on the ground of slander could not be amended so as to include an assault as one of the grounds for asking the damages. The only case in which new grounds of action may be added is when they are connected with the original grounds in some natural or necessary manner, and where there will be a risk that the whole merits of the original claim may not be disposed of if the new matter be excluded. Thus, a party suing upon a written obligation may amend to the effect of adding the ground of action formed by the consideration for which the obligation had been granted.(v) Again, if he omit to state expressly some ground of action apparently implied in his summons, he may add it. For example, a party who was prosecuting a messenger-at-arms for neglect of duty, in going on with diligence after execution had been stayed, was allowed to add a statement that the messenger was aware of the stay;(x) and in another case, a pursuer complaining of injuries sustained through the use of arrestments, was allowed to add that the arrestments had been used maliciously and without probable cause.(y) In all these cases it will be seen that the additions were in supplement of grounds of action already stated.

The preceding examples have been taken from cases where the amendment involved additional matter of fact. The principle

(u) *Per McNeill L. P.* (in *Hill v. Kinloch*, 19 June 1855, 17 D. 959). "The opinion of the Court has been repeatedly expressed, that any attempts to get new matter of fact introduced into a record which has been already closed, or indeed new matter at any stage, cannot be allowed."

(v) *Campbell v. Mitchell*, 2 July 1831, 9 S. 875; *Milne v. Mills*, 8 March 1844, 6 D. 986.

(x) *Bitchie v. Dunbar*, 28 Feb. 1849, 11 D. p. 882.

(y) *Brodie v. Young*, 19 Feb. 1851, 13 D. 737.

Amending or Adding to the Pleadings.

is equally applicable to the case of adding additional matter of law. Where matter of law has to be stated in a summons, as in the case of a statute having to be founded on, it is competent to add additional matter of law, such as a continuing statute,(z) or even (in special circumstances) an amending statute.(a)

6. **Abandoning Grounds of Action.**—Grounds of action may be abandoned at any time, either in whole or in part, and that without the necessity of a formal amendment. It is easy to conceive, however, that there might be an exception—such as that mentioned in treating of restricting the conclusions—where the effect of abandoning a part would be to change the character of the whole.

7. **Changing the Grounds of Action.**—As a change in the ground of action involves the abandonment of an original ground, and the statement of a new ground, it follows that it will be permitted with great difficulty, if it be permitted at all. It has been refused in cases where the pursuer wanted to change his title to sue,(b) and in the parallel case of his wanting to change the capacity in which he seeks to make the defender liable.(c) Of course in such cases as actions for damages, if a pursuer wanted to change the nature of the wrong on which he founded, the amendment would not be allowed.(d) But if the proposed change be within, and not substantially different from the original ground of action, it may be permitted.(e)

8. **Time for making Amendments.**—The proper time for mak-

(a) *Rankine v. Brown*, 24 Feb. 1858, 20 D. 672.

(a) *Colquhoun v. Caledonian and Dumbartonshire Railway Co.*, 10 July 1852, 14 D. 997.

(b) *Nisbet v. Cullen*, 29 May 1816, F. C.; *Smith v. Stoddart*, 5 July 1850, 12 D. 1185.

(c) *Kirkland v. Gibson*, 20 Dec. 1831, 10 S. 167.

(d) *Scott v. Curle and Erskine*, 8 June 1841, 2 Rob. Ap. Ca. 317; *Gilchrist v. Anderson*, 17 Nov. 1888, 1 D. 87.

(e) *Gray v. Sutherland*, 11 Mar. 1847, 9 D. 925.

 Second Amendments.

ing amendments on the summons is before the record is closed. Till then, any objection to making the amendments founded on its not having been proposed in due time is not readily listened to. But even before closing the record, if the amendment be not proposed till after discussions on dilatory defences, which should have preceded, and might have obviated it, the Court may decline to admit it.(g)

After the record is closed, the Sheriff-Substitute is absolutely precluded from permitting amendments. This prohibition is contained in § 56 of the Act of Sederunt of 1839, and was copied from § 10 of the Judicature Act. The Sheriff-Depute having power to open up the record,(h) it would follow that on exercising that power he could permit amendments as if the record had not been closed. This power might be held to authorise him to permit amendments even after proof; for the Court of Session have held that they have discretion to do that in cases brought before them not falling under the Judicature Act.(i)

It has been questioned whether, when a limited time is allowed for bringing an action, an amendment can be made after the expiry of that time, and there is a great deal to be said for the view that it is only the action which has been brought within the time, and not any different or amended action which the defender is bound to meet. Effect was accordingly given to this view in a case decided in the Court of Session, and though the case was reversed on another point in the House of Lords, its soundness on this point was not challenged.(k)

9. **Second Amendments.**—There is no rule making a second amendment incompetent. Courts are unwilling to admit them, lest a laxity of proceeding should be encouraged,(l) and in

(g) *Ross v. Mackenzie*, 27 May 1836, 14 S. 845. The amendments proposed in this case seemed also incompetent.

(h) 16 and 17 Vict., c. 80, § 16 (App. lxxviii).

(i) *Campbell v. Campbell*, 10 Feb. 1865, 3 Macph. 501.

(k) *Mitchell v. Stewart*, 1 Feb. 1838, 16 S. 409, and (as *Thomson v. Mitchell*) 28 July 1840, 1 Rob. App. Ca. 162.

(l) *Graham v. Anderson*, 12 Dec. 1837, 16 S. 212. The rubric of this case goes too far. The opinion of the Lord Ordinary as to the incompetency of a second

 Amending or Adding to the Pleadings.

general they are excluded, but in special circumstances second (*n*) and even third (*o*) amendments have been permitted.

10. Mode of Amendment.—An amendment of the summons must be proposed by minute, which is first allowed to be received and seen, and then (without ordering answers) parties are heard on it. If the amendment is permitted, an interlocutor is pronounced allowing it, and directing the clerk to add it to the summons, which he accordingly does, authenticating the addition by his signature. When a summons is amended in the absence of the defender, a copy of the amendment must be served on him in the same manner and on the same *inducie* as the original libel. (*p*)

It is not competent to endeavour to evade the rules as to allowing amendments by the use of a supplementary summons, with the object of attaining by the latter means what could not have been attained by the former. (*q*)

11. Dispensing with Amendment.—When a condescendence has been ordered, it often happens that additional grounds of action are stated which, strictly speaking, are not covered by the summons, but which would at once be allowed to be added by way of amendment, if attention were drawn to the matter. In such cases, the defender usually takes no objection, as he has little interest to do so; and the objection being of a preliminary kind, if he fails to take it at the time, he is precluded from taking it afterwards. A pursuer, however (so long as the law as to amendments remains in its present shape), will do well, where the addition is important, and especially where it affects the relevancy of the claim and is not merely intended to pave the way for proof, always to get the authority of the Court to

amendment was not adopted by the Court, and the judgment was founded on the inexpediency of permitting it.

(*n*) *Brodie v. Young*, 19 Feb. 1851, 13 D. 787, quoted *supra*, p. 153, note (*y*).

(*o*) *Hutton v. Douglas*, 1 March 1851, 13 D. 804.

(*p*) A. S. 1839, § 13.

(*q*) *Edinburgh and Glasgow Union Canal Co. v. Carmichael*, 27 May 1842, 1 Bell's App. Ca. 316.

Acquiescing in Amendment—Amending the Closed Record, &c.

make it by way of amendment. If this be not done, there is further, the risk—seldom indeed a great one—that the Court may take the objection *ex proprio motu*.(r) If the objection is pleaded that additional grounds of action have been stated without leave, and the objection be not obviated by amendment, it must be discussed before a proof is allowed.(s)

12. Acquiescing in Amendment.—A party may bar himself from objecting to an incompetent amendment, if he have acquiesced in it, by going on with the litigation as if it had been good, without any objection at the time of making, or any appeal against it at the proper stage.(t)

13. Amending the Closed Record.—As already pointed out in considering the time at which amendments may be made (*supra*, art. 8), the only way at present of getting an amendment on a closed record is by taking the case by appeal before the Sheriff-Depute, on the first competent opportunity, and asking him, in his discretion, to permit it. If he open up the record, he will be able to permit amendments on the summons such as the Sheriff-Substitute could have permitted before closing, and such additions to or alterations on the condescence and defences as may be requisite, and as may be competent without bringing the pleading into such shape that it could not have been originally so lodged in the action.(u)

14. Making Statements Specific and Correcting Errors.—There are two matters not properly involving amendments at all, but closely connected, and often confounded with them, which it is necessary here to notice, viz., explaining ambiguous or general statements, and the correction of obvious errors. These things may be done, when requisite, with the permission of the Court,

(r) See *Baird's Trs. v. Mitchell*, 8 July 1845, 7 D. 1001, where the Lord Ordinary apparently started the objection.

(s) *London Joint Stock Bank v. Stewart*, 14 Jan. 1859, 21 D. 250.

(t) *Johnstone v. Elliot*, 22 June 1824, 2 Shaw, Ap. Ca. 461.

(u) 16 and 17 Vict. c. 80, § 16 (App. lxxviii).

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and are not restricted either as to time or mode in the way in which other amendments are. In all the examples given below the explanations or corrections were made, in the Court of Session, on a closed record, notwithstanding the prohibition against amendments of that kind contained in the Judicature Act.(x)

It is frequently necessary for the safety of one of the parties that a greater specification should be added to a record. A simple instance is where the party has taken too great latitude in point of time, and it is required to be stated more precisely.(y) But it applies to other matters as well as time. For example, a party suing for damages for alleged injuries, may be called on or permitted to give farther specification in regard to the way in which he was injured,(z) or to the complaints which he made of them.(a) Even such important parts of a pursuer's case as the nature of his title have been allowed to be made more specific.(b)

Clerical errors may be corrected, with permission, at any time. In the case where the context clearly shows the error to have been clerical there is no difficulty.(c) In other cases it must be made to appear in some sufficient manner that the error was clerical.(d) Errors caused by deficient information are not clerical errors, and cannot be corrected as such, except in special cases. Such a case occurs when access has been refused to a deed, and a party is thereby obliged to describe it from memory. In that case an error in the date has no other effect on the opposite party than an error obviously clerical.(e) Care must be taken not to allow, under the guise of correcting a clerical error, a change in the ground of action.(g) The

(x) 6 Geo. IV., c. 20, § 10.

(y) *Stephen v. Paterson*, 1 March 1865, 8 Macph. 571.

(z) *Mackenzie v. Woddrop*, 24 Jan. 1854, 16 D. 381.

(a) *Broadwood v. Hunter*, 2 Feb. 1855, 17 D. 340.

(b) *Ferguson v. Stevenson*, 26 Jan. 1830, 8 S. 390.

(c) *M'Allister v. British Plate Glass Company*, 19 Feb. 1859, 21 D. 546.

(d) *Bayne v. Macgregor*, 18 June 1862, 24 D. 1130.

(e) *Bignell v. Flint*, 14 Dec. 1859, 22 D. 190.

(g) *Hill v. Kinloch*, 19 June 1855, 17 D. 958. The action complained of damages done by a flood occurring in "April 1850," and the pursuer wished to correct the time to "the spring of 1851."

Appointments to Confess or Deny—Ordering Statements of Accounts.

general mode of correcting a clerical error is by minute, followed by an interlocutor, but it might also be done by a marking on the margin, signed by the clerk by the judge's order.(h) In some cases no amendment is made at all, and the clerical error is simply disregarded.(i)

15. Appointments to Confess or Deny.—Applicable to certain cases there is a special power of pronouncing orders with a view to making the record specific. When the record has been closed, or at such earlier stage as the Sheriff shall think expedient, power is given to him to order the parties, or either of them, by a writing under their hands, "to confess or deny" specified facts.(j) Where records are properly framed and construed, this power seldom requires to be used. If a party fails in reply to a call upon him to confess or deny, he is held as confessed to such an extent as the Sheriff thinks just.

16. Ordering Statements of Accounts.—In some cases, such as those which depend on the result of an accounting, a record does not fully bring out the question at issue, and it is sometimes therefore expedient that statements of accounts should be lodged. The Sheriff accordingly has it in his power to call on either party to lodge statements of all accounts relevant to the matter at issue.(k) To clear up such matters farther, he may, when the accounts are lodged, also order objections to them to be lodged, and then he may allow answers to those objections; and lastly, he may allow both the objections and the answers to be revised. Since 1853 it has been requisite to exclude argument from such pleadings.(l) The Act of Sedes-runt does not point out any particular stage of the process as the proper one for lodging such accounts and relative pleadings;

(h) See note (d), p. 158.

(i) *Hutchison v. Thomas*, 10 July 1828, 6 S. 1130. A summons for aliment said the child was born in February when it should have been January.

Aliment was awarded from the former date without amendment.

(j) A. S. 10 July 1839, § 66 (App. liii).

(k) A. S. 1839, § 87 (App. lvii).

(l) 16 and 17 Vict. c. 80, § 12.

Amending or Adding to the Pleadings.

but as the Act of 1853 contemplates that the first thing to be done in all actions is to make up the record, they should not in general be ordered till that has been done. There are cases, however, where to delay the accounts in this way would be to waste the record; and in cases where right to see the accounts is not disputed, there seems no absolute incompetency in beginning by ordering their production.

17. *Res noviter veniens ad notitiam*.—Hitherto we have dealt with the modes of stating matters known, or which ought to have been known, to the parties at the time of lodging the pleadings which contained, or should have contained them. The addition of matter coming to knowledge after the record has been closed is provided for by section 58 of the Act of Sederunt of 1839, which regulates the lodging of a “statement of any matter of fact or document *noviter veniens ad notitiam*, or emerging since the record was closed.”(n)

With reference to the *matters of fact* (as distinguished from documents) which may thus be brought forward, they must, in the first place, be such as it was essential to have stated in the original record. The provisions as to bringing forward *res noviter* will not be allowed to be used as a means for introducing new evidence, discovered since the proof was closed. If such evidence be discovered, its admission must be applied for by asking additional proof, and its admissibility will depend on the competency of allowing such proof.(o) In the second place, as the name implies, the matter must have come to the knowledge of the party since the record was closed. It is not, however, enough to make it *res noviter* that the party simply did not know of it when the record was closed. To hold this might make parties careless in their investigations. Nothing is *res noviter* which it was in the power of the party to have discovered with ordinary care before closing the record.(p) The

(n) A. S. 10 July 1839, § 58 (App. lii), framed on the model of § 10 of the Judicature Act.

(o) *Longworth v. Yelverton*, 10 March 1865, 3 Macph. 645.

(p) *Per Lord President in Campbell v. Campbell*, 10 Feb. 1865, 3 Macph. 504.

Time for stating *Res Noviter*.

competency is therefore very much a question of circumstances.(q) Thus, it was held that the ignorance was inexcusable where attention had been directed to the matter by a defence in a former action;(r) while, on the other hand, the ignorance was excused where the facts appeared from evidence withheld by the other party till the record had been closed.(s)

With reference to *documents*, the principle is the same as with reference to matters of fact. A newly discovered document cannot be founded on in the record unless it be one necessary to support, or negative, in whole or in part, a ground of action or defence. It must also be a document of whose existence, or of whose contents, the party was excusably ignorant at the date of closing the record. What is excusable ignorance is (as formerly) a question of circumstances. It has been supposed that there was a rule that documents recorded in the public records could in no case be founded on as *res noviter*; but that is a mistake, and such deeds have been admitted.(t) It will, however, be an element in considering how far the party was excusably ignorant, and will raise a presumption against him.(u)

18. Time for stating *Res Noviter*.—By the Act of Sederunt it is made competent to tender a statement of *res noviter* at any time before final judgment is pronounced. This obviates a difficulty which has occurred in the Court of Session in interpreting the Judicature Act, where the like proceeding was made competent at any time in the “course of a cause.” A party may, however, foreclose himself from the right to make the statement if he delay to do so, after discovering the fact or document, until another material step in the process (such as a proof) has been taken.(v)

(q) *Per* Lord President M'Neill in *Maitland v. M'Clelland*, *infra*, note (t).

(r) *North British Railway Co. v. Brown, Gordon & Co.*, 12 June 1857, 19 D. 840.

(s) *Bain v. Balfour*, 1 June 1838, 16 S. 1097.

(t) *Maitland v. M'Clelland*, 2 July 1857, 19 D. 945.

(u) *Grahame v. Grahame*, 14 June 1825, 1 Wilson and Shaw, 353.

(v) *Hansen v. Craig*, 16 July 1858, 20 D. 1306.

 Abandoning Actions.

19. Mode of stating Res Noviter.—The mode of making a statement of *res noviter* is somewhat complicated. The party begins with a motion for leave to lodge it, which he may make either verbally or by a short note without argument. The Sheriff then appoints him to give in, within a specified time, a condescendence stating, in the first place, the alleged *res noviter*, and, in the second place, the circumstances under which it only recently came to his knowledge. Either in this, or by a subsequent order, the Sheriff may, if he see cause, appoint the other party, within a specified time, to answer the second part of the condescendence. The Sheriff then determines, *upon proof or otherwise*, whether the *res noviter* is to be added to the cause. At the same time he determines or specially reserves the point of expenses. If he is of opinion that the *res noviter* ought to be added, he pronounces an order to that effect, and appoints the opposite party to answer the first part of the condescendence. The proceeding finishes by the record being closed of new upon the additional papers.(x)

Section V.—OF ABANDONING, CONJOINING, AND SISTING ACTIONS.

ABANDONING ACTIONS.

1. *Mode of Abandoning.*
2. *Time of Abandoning.*
3. *Minute of Abandonment.*
4. *Condition as to Expenses.*
5. *Requisite Interlocutors.*
6. *Partial Abandonment.*

CONJOINING ACTIONS.

7. *Power of Conjoining.*
8. *When proper to Conjoin—Case of Parties being the same.*

9. *When proper to Conjoin—Case of Parties not being the same.*
10. *Neither Parties nor Matters at issue the same.*
11. *Time of Conjoining.*
12. *Mode and Effect of Conjoining.*
13. *Disjoining Conjoined Actions.*

SISTING ACTIONS.

14. *Power of sisting Actions.*
15. *Sisting to have Document Stamped.*

 ABANDONING ACTIONS.

The power to abandon an action, and to commence pro-

(x) A. S. 10 July 1839, § 58 (App. lii).

Mode of Abandoning.

ceedings anew, is a power given to pursuers to meet the case of their finding that the action has been mismanaged in some respect, and to enable them to save the time that would be lost in going on to have the action dismissed, or to the still worse event of having a decision pronounced adverse to the claim. The power is considered to be under sufficient control when payment of expenses is made a condition of the right to abandon. There is no similar power to a defender who finds that he has mismanaged his defence.

1. Mode of Abandoning.—Before enrolment the action may be abandoned by a letter from the pursuer, coupled with a judicial renunciation of it in the new action brought in its stead.^(y) It is erroneous, however, to suppose that a letter alone is sufficient to effect the abandonment of an action which has not been enrolled.^(z)

After enrolment, the abandonment of actions is, in practice, regulated entirely by the Act of Sederunt of 1839, though there seems to have been no express repeal of the old common law power of abandoning, which, before litiscontestation, was exercised by the pursuer passing from the instance on payment of the defender's expenses;^(a) and, after litiscontestation, was carried out by pronouncing decree of absolvitor, and dealing with expenses as to the Court might seem right.^(b) The common law powers are in disuse, and are not now of consequence, because the remedy before litiscontestation is the same as that in the Act of Sederunt; and the discretion which, after litiscontestation, was got in regard to expenses, was at the cost of the pursuer having to submit to decree of absolvitor.

The provisions of the Act of Sederunt are, that "it shall be competent to the pursuer, before any interlocutor of absolvitor is pronounced, to enter on the record an abandonment of the

^(y) *Laidlaw v. Smith*, 8 March 1834, 12 S. 538. 12,125; *Carnousie*, 18 Dec. 1669, M. 12,134; *Stair*, 4. 40. 8.

^(z) *Per Deas in Campbell's Trustees v. Campbell*, 3 July 1863, 1 Macph. 1019.

^(a) *Knocs v. Irvine*, March 1858, M.

^(b) *Jolly*, 10th June 1625, M. 12,129; *Caledonian Iron Company v. Olyne*, 14 Dec. 1831, 10 S. 133.

Abandoning Actions.

cause on paying full expenses to the defender, and to bring a new action if otherwise competent.”(c)

2. **Time of Abandoning.**—In the Court of Session the clause of the Judicature Act corresponding with the clause above quoted gives no power of abandoning till the record has been closed.(d) In the Sheriff-Court there is no such limitation. In the Act of Sederunt passed in 1828, to carry out the Judicature Act, another limitation was put on the power of abandonment in the Court of Session, so as to make it incompetent to abandon not only after actual absolvitor, but after any interlocutor “leading by necessary inference to such absolvitor.”(e) This limitation, calculated only to give rise to nice questions, has not been repeated in the Act of Sederunt of 1839. It is the actual pronouncing of judgment which ends the power, and though opinions may have been delivered fatal to the pursuer’s case, he is in time to abandon, so long as the terms of the interlocutor of absolvitor are not settled.(g)

3. **Minute of Abandonment.**—The pursuer must enter his abandonment on the record. This is done by minute. Formerly it was common for the minute to contain an offer to pay expenses, and a reservation of right to bring a new action, but the Court of Session have decided that this is irregular, and that the minute in that Court should simply be—“abandon this cause in terms of the statute.” In like manner, the minute in the Sheriff-Court should contain no qualification or reservation.(h)

4. **Condition as to Expenses.**—Payment of expenses is a condition precedent of abandonment. Though an interlocutor holding the action abandoned has been pronounced, the

(c) A. S. 1839, § 61 (App. liii).

(d) 6 Geo. IV, c. 120, § 10.

(e) A. S. 11th July 1828, § 115.

(g) *Western Bank v. Baird*, 20 March 1862, 24 D. 859.

(h) *Adamson v. Guild*, 28 June 1867, 6 Macph. 347.

Requisite Interlocutors.

action will subsist till the expenses have been fixed and determined for, and a new action will be incompetent until actual payment. If the defender delay to proceed to settle the question of expenses, the pursuer may consign a suitable amount, and the defender will be held in the new action as barred from objecting.⁽ⁱ⁾ The case in which this was settled perhaps went too far in holding that it was sufficient to consign the amount after the new action had been brought. It has recently been held—and the necessity for the decision must be regretted—that a new action was incompetent because the summons was served on the day before decree for expenses was pronounced in the abandoned action; and that even accepting payment of those expenses did not preclude the defender from stating this plea.^(k)

“Full expenses” in the Act of Sederunt mean the expenses as between party and party, without being subject to any modification, but do not mean expenses as between agent and client.^(l)

5. Requisite Interlocutors.—In addition to the minute and the payment of the expenses, the abandonment to be complete, requires to be sustained by an order of the Court. This is absolutely necessary, and if the Sheriff should mistakenly refuse to pronounce such an order the pursuer must appeal.⁽ⁿ⁾ The proper form of order is, “to hold the action as abandoned under the condition and reservation contained in the 61st section of the Act of Sederunt of 10th July 1839.” The order should contain no other conditions or reservations.^(o) It is unnecessary to “dismiss” the action; and wrong to pronounce absolutor. Sometimes the order is pronounced at once on the minute of abandonment being lodged, and sometimes not till after the

(i) *Lawson v. Low*, 1 July 1845, 7 D. 960.

(k) *Aitken v. Dick*, 7 July 1863, 1 Macph. 1038.

(l) *Lockhart v. Lockhart*, 15 July 1845, 7 D. 1045.

(n) *Cormack v. Waters*, 28 Feb 1846,

8 D. 889. (In this case the Sheriff refused to hold the action as abandoned till it should appear what had become of some steps of process which the pursuer's agent had withdrawn.) *Muir v. Barr*, 2 Feb. 1849, 11 D. 488.

(o) See *Western Bank v. Baird*, *supra*.

Conjoining Actions.

receipt for the expenses has been produced, but there is no material difference between the ways, and though the latter seems fully the more accurate, the former seems that followed in the Court of Session.

6. Whether Partial Abandonment Competent.—It has not been decided whether it is competent to abandon part of an action. After decree disposing of part of the conclusions has been pronounced, it would appear quite competent for the pursuer to abandon the remainder, as that remainder would then be the whole action before the Court; but the question is more difficult whether a pursuer can abandon a part of his action, go on with the remainder, and bring a new action as to the abandoned part? Of course he may restrict the conclusions of his summons, but the result of doing that would be, that the points cut out by the restriction would be held as determined against him. The difficulty is, whether he can so abandon part of the conclusions as to reserve right to bring a new action on them? and on that question the considerations of weight seem to be, that while the Act of Sederunt neither expressly authorises nor even contemplates such a course, to follow it would be to subject the defender to an accumulation of actions.(g)

CONJOINING ACTIONS.

7. Power of Conjoining.—When actions in Court depend between the same parties, or relate to the same matter, it is frequently desirable to conjoin them, so as to save trouble and expense. No special regulations have been made directing when or how this should be done. Each case is judged of by itself, and it is in the discretion of the Court to say when it should be done. In the Court of Session, where each Division and each Lord Ordinary forms a distinct Court, there is often used a proceeding, short of conjoining, called remitting

(g) See *Wilson v. Magistrates of Musselburgh*, 22 Feb. 1868, 6 Macph. 483, and *Hay v. Earl of Morton*, 6 June 1862, 24 D. 1054.

When proper to Conjoin: Case of Parties not being the same.

ob contingentiam, by which connected actions enrolled before different judges are transferred so as to bring them before the same judge. The rules—partly statutory—under which this is done need not be considered here, because there is no practice (however useful it might occasionally be) of remitting causes from one Sheriff-Court to another; (r) and in the Sheriff-Courts where there is more than one judge, the rolls are kept apart for convenience only, and causes may be transferred from one judge to another at the discretion of the Sheriff.

8. When Proper to Conjoin—Case of Parties not being the Same.—If the parties are the same, there is such an obvious convenience in having the actions disposed of together that there will be a disposition to conjoin them if the subject matter of the one is connected with that of the other, though the connection may not be very close. There must, however, be something to be gained by the conjunction, in the way of either shortening or simplifying the investigation and the settlement of the questions at issue; and it will not be done if it is to prejudice the rights of either party.(s) Thus, though the parties were the same, and the subject matter was almost the same, the Court refused to conjoin where the effect would have been to give the defenders the benefit, in regard to the whole case, of certain pleas which they had stated in the second, but had omitted to state in the first, action.(t) Conjunction, in like manner, will be refused if it is to have the effect of giving to a party the benefit of a plea of compensation to which he is not entitled.(u) The motion for conjunction may be refused on grounds of mere expediency, as, for instance, if it be desirable to have the one action tried before the other, or in a different manner from the other.

(r) *Wauchope v. The North British Railway*, 6 March 1862, 4 Macqueen Ap. Ca. 848.

(s) There is an exception in Maritime cases, which see *infra*.

(t) *National Exchange Company v. Drew and Dick*, 12 July 1861, 23 D. 1278.

(u) *M'Leay v. Rose*, 17th Feb. 1826, 4 S. 481.

Conjoining Actions.

9. When Proper to Conjoin—Case of Parties being the Same.—

Even though the parties be not exactly the same, actions as to the same matter may be conjoined if there be the prospect of great convenience in doing so, in the way of making one record or one proof serve for all. Thus, two actions were conjoined where different pursuers were making the same demand on a defender.(v) Actions were also conjoined where the same pursuer prosecuted different defenders in regard to the same matter.(x) In the same way counter actions may be conjoined, although the pursuers of the one may not be altogether the same as the defenders in the other, provided that both actions are such as to make it desirable to have all the parties in the field in settling each of them.(y) This principle does not apply where the second action is one of relief, brought by the defender of the first against some third party; for, though both actions are (in a certain sense) in regard to the same matter, the defender's liability in the first may depend upon quite different considerations from his right to relief in the second.(z)

10. Neither Parties nor Matters at issue the same.—If neither the parties, nor the grounds of action, nor yet the remedies claimed, be exactly the same, the cases cannot be conjoined; even though, in regard to each of them, the actions should be closely connected. In such a case the difficulties of keeping separate what pertained to each action would more than counterbalance any saving gained by having a joint inquiry.(a)

11. Time of Conjoining.—Both actions must be in dependence and must be before the same Court. It is desirable, also,

(v) *Lindeay v. Chapman*, 23 Feb. 1826, 4 S. 490.

(x) *Buccleuch v. Cowan*, 23 Feb. 1866, 4 Macph. 475. The defenders were charged with making nuisances in a river at different stages of its course.

(y) *M'Dowall v. Campbell*, 17th Feb. 1838, 16 S. 629.

(z) *Mackay v. Greenhill*, 14th July 1858, 20 D. 1251; *Gray v. Kerr*, 7th Feb. 1837, 15 S. 494.

(a) *Western Bank v. Douglas*, 20th March 1860, 22 D. 447.

Mode and Effect of Conjoining—Of Disjoining Actions.

that they should both be at the same stage, and, if possible, this stage should be before closing the record. When they are not in the same stage, the first action may be delayed until the second has been brought up. After a proof has been taken in one of the actions, it can only be in very special circumstances that it will be desirable to conjoin with it another, in which proof has not been taken.

12. Mode and Effect of Conjoining.—The mode of conjoining is by writing an interlocutor to that effect in both actions; and thereafter both processes proceed together. The interlocutors, after conjunction, are written on the interlocutor sheet of the principal action, or on a new interlocutor sheet, and all steps taken are applicable to both. Steps taken before conjoining remain applicable only to the action in which they have been taken, unless there has been an express consent or order at the time of conjoining that they should be applicable to both. In disposing of the conjoined actions all conclusions should be specially disposed of, so as distinctly to show what is done on each action.

13. Of Disjoining Actions.—Actions which have been conjoined may be disjoined at any time. For example, this has been done where it has turned out that it would be better, after all, to try one of them before the other. (b) If they have a joint record, it may remain the record in the leading action, and a new record may be made up in the other.

SISTING ACTIONS.

14. Power of Sisting Actions.—The power of sisting an action is a power by which the action is delayed until either the pursuer or the defender shall have taken some particular proceeding. This power is sparingly exercised, as it interferes to some extent with the right of every litigant to have his case heard and determined as quickly as possible.

(b) *Turner v. Tunnock's Trustee*, 29 January 1864, 2 Macph. 509.

Sisting Actions.

The actions which it is competent to sist are usually petitory actions which a pursuer has brought too soon ; for example, where he ought first to have brought a reduction to clear away some deed establishing the defender's right,(c) or to have brought a declarator,(d) or proving of the tenor,(e) to establish his own right. In such cases the first process is sisted for a reasonable period, to allow the pursuer to bring the requisite action. The same principle applies where a pursuer brings an action in circumstances where he ought to have waited for the completion of proceedings already in dependence.(g)

In other cases the power is exercised to enable the defender to bring an action to constitute some defence which he is not allowed to plead by way of exception. Here the process is sisted to allow the defender to bring the requisite action. The power of sisting must not, however, be used so as to give the benefit of pleas to a defender to which he has no right. It is, for example, incompetent to sist an action for a liquid claim till an illiquid claim is constituted ; though, if the action for the latter be almost completed, there is a discretion to sist the former for a short period, on the authority of the maxim, *quod statim liquidari potest pro jam liquido habetur*.(h)

Sisted actions may be revived by recalling the sist, which may be done either on the completion of the proceedings for which it was allowed, or on the failure of the proper party to proceed diligently with them. As it is incompetent to take any proceedings in a sisted action, it should not be liable to the statutory dismissal which overtakes actions in which the parties take no steps for a certain period.(i)

(c) *Birrell v. Dundee Gaol Commissioners*, 26 Nov. 1856, 29 Jurist, 46; *M'Laren v. Steele*, 18 Nov. 1857, 20 D. 48.

(d) *Louden v. Young*, 21 May 1856, 18 D. 856.

(e) *Officers of Ordnance v. Wood*, 8 March 1825, 8 S. 629.

(g) *Girdwood v. Hercules Insurance Co.*, 2 Feb. 1838, 11 S. 351.

(h) *Munro v. Macdonald's Executors*, 30 March 1866, 4 Macph. 687.

(i) 16 and 17 Vict. c. 80, § 15; and *infra*, Section VII.

Sisting to have Document Stamped.

15. Sisting to have Document Stamped.—Where either party produces and founds on a document which requires to be stamped before it can be looked at by the Court, it is competent to sist the action for a reasonable time, to enable the party to get the stamp affixed by the proper authorities. It is not regular, however, at this stage to determine any question as to who is to be liable for the expenses of the post-stamping. These must be borne, in the first place, by the party who is obliged to found on the deed ;(*k*) though, if the deed be a bilateral one, and he succeed in his action, the Court may, in dealing with the general expenses of the action, award to him the half of what the stamping has cost.(*l*)

Section VI.—OF OCCASIONAL PROCEEDINGS IN THE WAY OF PROOF.

JUDICIAL EXAMINATIONS.

1. *When Judicial Examination competent.*
2. *Time of taking Examination.*
3. *Mode of taking Examination.*
4. *Party failing to appear.*
5. *Effect of Admissions.*

JUDICIAL VISITATIONS.

6. *How Judicial Visitations made.*
7. *Purpose of Visitations.*

REMITTS TO REPORT.

8. *When competent to make Remit to a reporter.*
9. *Remits not of Consent.*
10. *Remits of Consent.*
11. *Time for Remitting.*

12. *Of Objections and Answers to Reports.*13. *Expense of Report.*

COMMISSIONS.

14. *When competent to issue Commissions.*
15. *How Commissions granted.*
16. *How Witnesses cited under Commissions.*
17. *Conduct of the Examination.*
18. *Circumducing time for Reporting.*
19. *Reporting the Commission.*

PROOF IN RETENTIS.

20. *When competent to take Proof in retentis.*
21. *How Proof in retentis taken.*
22. *Effect of Proof in retentis.*

The way in which proof is usually taken has been explained ; but there are certain auxiliary proceedings which require explanation.

(*k*) *Neil v. Leslie*, 19 March 1867, 5 Macph. 634.

(*l*) *Wylie v. Times Fire Assurance Co.*, 15 March 1861, 23 D. 727.

Occasional Proceedings in Proof.

Sometimes it is thought that if the parties are themselves examined in presence of the Judge as to their statements on record, proof may be avoided or shortened; and before the period at which it was made competent to examine the parties as witnesses such judicial examinations were in not uncommon use.

Occasionally questions occur as to localities and particular things, where it would greatly facilitate the taking or understanding of a proof that the Judge had seen them; and it is therefore necessary to say a few words as to the rules under which judicial visitations, as they are called, are conducted.

Instead of the judge himself going to make such an investigation, he may—and this is the more common proceeding—remit to some person of skill to examine and make a report. This power is used also in cases where laborious investigations are required into complicated matters of fact which it is impossible for the Sheriff to undertake,—such as into the state of the accounts between two parties,—where it is expected that a careful examination by a skilled person may bring out or lessen the number of the points at issue.

With respect to the proof itself, it may happen that witnesses are unable to attend, and therefore it must be considered when it is competent to issue commissions to take their evidence, and under what rules such commissions are carried out.

Lastly, it is requisite to provide for an emergency which may (though with the new forms of proceedings it seldom does) occur, of there being danger that evidence may be lost before the arrival of the proper opportunity of bringing it forward. The way in which this is provided for is by issuing a commission to take the evidence to lie *in retentis*. Such a commission would precede in its issue any other commission or proof in the cause; but as what has been or will be said in regard to those others will leave little to be said as to this, it will be convenient to take the subjects in the order in which they are here mentioned.

When Judicial Examination Competent.

JUDICIAL EXAMINATIONS.

1. When Judicial Examination competent.—Even before the Evidence Act of 1853—by rendering it competent (in most cases) to examine parties to a suit as witnesses—had thrown judicial examinations into almost total disuse, their use was coming to be rare, as the Judges were coming to think they were not of much service, and were liable to be abused. They are hardly used at all now. Even in the kind of cases (such as filiation cases) where their use was formerly the most frequent, the practice of using them, except under very special circumstances, is condemned by the best authorities.⁽ⁿ⁾ However, their use is still competent,^(o) and sometimes even advisable in those cases where it is still incompetent to examine the parties as witnesses. The rules concerning judicial examinations will be found principally in sections 66 and 67 of the Act of Sederunt of 1839.^(p)

It is in the discretion of the Judge to allow or refuse a judicial examination, and in general it will not be allowed unless there be some solid ground for suspecting the undue concealment of material facts by one or other of the parties,^(q) and some reasonable expectation that the examination will throw light on them.^(r) There are two cases, however, where it is incompetent to take a judicial examination if the party to be examined objects to it. The first of those is, cases where the party is being sued for some act for which he could be prosecuted as a criminal.^(s) But if the party be safe from punishment—for instance, from his having been taken as King's evidence—he is liable to examination.^(t) The second of the cases where judicial examinations are incompetent is, where the proof

(n) See Mr E. S. Gordon's remarks on it in *Scottish Law Mag. Reports*, vol. i, p. 171.

(o) See the reservation in the Evidence Act of 1853, § 6 (App. ccxviii).

(p) App. liii.

(q) See *A B v. C D*, 23 Dec. 1843, 6 D. 346.

(r) A very full account of the law, clearly stated, will be found in *Dickson on Evidence*, §§ 1894–1404.

(s) *Nisbet v. Cullen*, 1 Feb. 1811, F.C.

(t) *Jantsen v. Easton*, 8 Feb. 1811, F.C.

Judicial Examinations.

is limited by law to writ or oath.(u) But here also there is an exception when circumstances appear of the kind which would let in parole proof.(v)

2. Time of taking Examination.—The proper time for taking a judicial examination is after the record has been closed and before proof has been ordered. It is not incompetent before closing the record, but it would be obviously unfair to subject a party to examination before his opponent had stated his case; and after an order for proof had been pronounced it would be irregular to interrupt its course. After such an order a judicial examination might be more readily allowed in those cases (such as breach of promise of marriage) where the parties cannot be examined as witnesses. Its mere competency after an order for proof has been admitted in other cases.(x) After the examination of any of the witnesses it becomes still more irregular;(y) and it will not be allowed after the examination on oath of the party in question,(z) or (still more clearly) after a reference to his oath.

3. Mode of taking Examination.—A time is fixed by interlocutor for taking the judicial examination. The party to be examined is appointed to attend personally, and answer such interrogatories as the Sheriff, or a Commissioner, shall think proper. The examination takes place in presence of the Sheriff; but when he cannot attend, or in cases of special emergency, he has power to appoint a commissioner to act for him.(a) The

(u) *M'Master v. Brown*, 28 Jan. 1829, 7 S. 337; *Campbell v. Hill*, 29 Nov. 1826, 5 S. 54; *Little v. Smith*, 9 Dec. 1845, 8 D. 265.

(v) *Fell v. Lyon*, 16 Feb. 1830, 8 S. 543; *Campbell v. Turner*, 24 Jan. 1824, 1 S. 266; *Cairncross*, 6 March 1824, 2 S. 774; cited in Wilson's edition of Thomson on Bills, p. 61.

(z) *M'Kellar v. Scott*, 8 Feb. 1862, 24 D. 499. *Macintosh v. M'Kinlay*, 27

May 1823, 2 S. 339, has been cited as showing the absolute incompetency of a judicial examination after an order for proof, but it was decided on the special terms of a remit.

(y) *Young v. Watt*, 19 Nov. 1747, M. 6775.

(z) *Jameson v. Barclay*, 14 Jan. 1820, F.C.

(a) A. S. 1839, § 67. The rules (contained in the Act of 1853) which limit the

Party failing to Appear—Effect of Admission, &c.

party is not put on oath. In general the questions are put by the opposite party; but when he is done, there seems nothing incompetent in the judge putting questions, either of his own accord or on the suggestion of the party's own agent, and this is frequently necessary in order that the justice of the case may appear. The evidence is dictated to the Sheriff-Clerk, and is signed by the party in the same way as a deposition.

4. Party failing to Appear.—If the party to be examined fail to comply with the order to appear, he is to be held "as confessed to such extent as the Sheriff may think just." Decree holding him as so confessed is then pronounced; but the Sheriff may repon on cause shown, and on payment of such costs as he may fix. (b) When necessary, the Court may treat failures to appear, especially if repeated, as a default, and assoilzie the defender, (c) or decern against him, as the case may be.

5. Effect of Admission.—The effect of an admission made by a party in the course of the judicial examination is not altogether equal to that of an admission on record. (d) If it were to be so treated, there might be a risk that a party of an easy disposition might be induced by a skilful cross-examination to give answers fatal to himself, and yet ill founded; and, therefore, a party who tenders proof cannot well be prevented from showing that any admission he may have made was really founded on error.

JUDICIAL VISITATIONS.

6. How Judicial Visitations made.—It is competent for the Sheriff to visit and inspect the *locus* wherever he considers it desirable to do so. This must be done in presence of the Clerk of Court and of both parties, and sometimes the Sheriff is ac-

power of the Sheriff to appoint commissioners to take regular proofs do not apply.

(b) A. S. 1839, § 69.

(c) *A B v. C D*, 2 March 1844, 6 D. 982.

(d) *Wilson v. Beveridge*, 9 Dec. 1831, 10 S. 110.

Judicial Visitations—Remits to Report.

accompanied by a man skilled in the particular matter in dispute. Should the inspection be made without the knowledge of one of the parties it would be irregular, and might disqualify the judge; but it would not signify though one of the parties, after due intimation, should fail to attend. The Sheriff causes a minute of his examination to be made, which in general records merely the fact of its having taken place.

7. Purpose of Visitation.—The object of the examination is not to collect evidence, or (still less) to make the judge a witness in the cause, but to enable the judge to understand the evidence that has been or is about to be adduced. An inspection might be made the ground for *interim* regulation of possession, where that was matter of discretion, but it could not be made the foundation of a final judgment.

Visitations are not in much use in the Sheriff-Court. In the Court of Session juries sometimes make similar inspections.

REMITTS TO REPORT.

8. When competent to make Remit.—The granting of remits to persons of skill to make reports is regulated by chapter 10 of the Act of Sederunt of 1839, and by section 10 of the Act of 1853.

It is incompetent for a Judge to delegate to another the duty of inquiry into the law, but it is competent for him to remit to make inquiries into any matter of fact, and here it is necessary to distinguish two kinds of remits, those which are, and those which are not, made of consent of both parties.

9. Remits not of Consent.—The object of remits, when not made of consent of both parties, is not to supersede proof but to prepare the way for it. The Sheriff is not entitled to make a remit stand instead of a proof; (e) but as a preliminary to one, a remit is often valuable, by getting information for the Judge, and possibly for the parties, in regard to the matters of fact at

(e) *Gallbreath v. Taylor*, 20 Jan. 1843, 5 D. 428.

Remits of Consent—Time for Remitting.

issue. Often it thus saves, in a complicated case, a great deal of trouble, and greatly shortens the proof.(g) A report however is not evidence, and it follows from what has been said that it cannot be made the foundation of a judgment, except perhaps for the purpose of regulating interim possession in cases where the Judge has a discretion in regard to that. A report can be made evidence by adducing the reporter as a witness in the course of a proof, and asking him to depone to its truth.(h)

10. *Remits of Consent.*—When a remit is made of consent of both parties to a man of skill to inquire into a matter of fact, the report supersedes proof, and is final on that point. It is necessary to notice that the Act of 1853 requires the consent of *both* parties; and thus indirectly alters the old rule which made it incompetent, though the opposite party had not consented, for the party who had moved for the remit to dispute the facts stated by the reporter. The Act of 1853 also virtually alters the old rule, that parties not objecting to a remit were held to acquiesce in the report.(i)

The proper evidence of the consent of the parties is a minute. There appears however no absolute necessity for that, provided the consent be otherwise made apparent, as it would be if the interlocutor bore to be of consent, and both parties without protest allowed the reference to proceed. Care must therefore be taken, if the order makes any mistake on this point, to apply to have it corrected within the period pointed out for the correction of errors.

11. *Time for Remitting.*—Except in very special cases the proper time for remitting is after the record has been closed and after the preliminary pleas have been disposed of,(k) and

(g) Even in causes proper (in the Court of Session) for jury trial, a remit is often advisable; *Western Bank v. Baird*, 4 June 1867, 5 Macph. (H. L.) 93.

(h) The practice of getting the re-

porter to swear to the truth of his report on its being lodged, is obsolete.

(i) *Wilson v. Struthers*, 10 Feb. 1837, 15 S. 523.

(k) *Rose v. M'Leod*, 4 Dec. 1828, 7 S. 140.

Remits to Report.

before ordering proof. Remits, however, are sometimes made before answer; but before closing the record they should not be made except in cases of great urgency. Where, for instance, the subject is of a perishable nature, it may be proper to have it examined earlier than at the usual stage. After proof has been allowed, it is doubtful whether a remit can be made, except of consent, for it is irregular to interrupt the proof, and unless the report is to be of the nature of evidence, there seems no opportunity for getting it into the case. After the proof has been taken and closed, it would be still more objectionable to make a remit, except of consent.

12. Of Objections and Answers to Reports.—The Act of Sederunt of 1839 (§ 89) permits the Sheriff to allow objections to the report, and answers to those objections. It also permits him to order these papers to be revised. This power is seriously curtailed by the provision in the Act of 1853 prohibiting written argumentative pleadings, except in certain specified instances, which do not include the present case.^(l) Such pleadings therefore, if ordered, must contain no argument. In practice, they are not much used, except when the report is that of an accountant; but occasions may arise where such pleadings will be found useful in narrowing the matters at issue.

13. Expense of Report.—Where remits have been made by the Judge at the regular stage, both parties are liable to the reporter, jointly and severally, for his remuneration, and that even though they should have objected to the remit.⁽ⁿ⁾ Where, however, a remit has been made before the regular stage, at the instance of one of the parties, and with the view of preserving evidence for his benefit, it would appear right that, in the first instance, he only should be liable for the expenses. In the end they form part of the general expenses of the process.^(o)

(l) 16 and 17 Vict. c. 80, § 12 (Appx. p. lxxvi).

(n) *Brown v. Gordon*, 2 March 1827, 5 S. 514.

(o) A. S. 1839, § 90.

When Competent to Issue Commissions.

The agents are, by the terms of the Act of Sederunt of 1839, liable jointly (not severally) for the expenses, unless the Sheriff shall in particular cases see reason to order otherwise. The expenses are usually provided for, in the first instance, at the agent's joint cost. The agent cannot relieve himself of this responsibility by intimating to the reporter that he will not be liable. The only way in which he can get quit of it is by resigning the agency when the remit is made.(p) Prior to the Act of Sederunt an agent seems to have been liable, both jointly and severally, in the same way as his client.(q) Agents, however, are not, unless it be so arranged, chargeable with the expenses of accountants' reports.(r)

The reporter has a lien on his report for his expenses, and the Court will not order him to lodge it until all his proper charges have been paid. If one of the parties have paid the reporter's charge, the Court will not, as a general rule, appoint the report to be lodged in process until the other party has paid his share;(s) but there may be special cases where the Court may order the report to be produced.(t) The amount of remuneration is fixed by the Court, and the reporter may appear in the process and get decree for it in his own name.(u)

COMMISSIONS TO TAKE EVIDENCE.

14. When competent to issue Commissions.—Where proof has been allowed, it is competent for the Sheriff to grant commissions to take evidence in two cases only. The first case is where the witnesses are resident beyond the jurisdiction of the Court; and the second, where they are unable by reason of age, infirmity, or sickness, to attend the diet of proof.(v) In

(p) *Milne v. M'Lean*, 31 May 1825, 4 S. 45.

(q) *Scott v. Robertson*, 25 June 1829, 7 S. 796. This case also settles that if there have been a change of agent, the agent who is acting at the time the report is lodged is liable.

(r) See note (n), p. 178.

(s) *Sutherland v. Sprot*, 24 Feb. 1855 17 D. 509.

(t) *M'Queen v. M'Queen's Trs.*, 18 Jan. 1851, 18 D. 503.

(u) See *Brown v. Gordon*, *Milne v. M'Lean*, and *Sutherland v. Sprot*, *supra*.

(v) 16 and 17 Vict. c. 80, § 10 (Appx. lxxvi).

Commissions to take Evidence.

all other cases the granting of a commission is absolutely incompetent, and no excuse, however satisfactory,^(w) and no considerations of convenience, however obvious,^(x) can, *even with the consent of both parties*, make it competent. When proof has been taken by commission which ought not to have been so, the Supreme Court orders the proof (if it hold proof necessary) to be retaken. Even in the cases where it is competent to issue a commission, it is not always advisable that the Sheriff should do so. Witnesses resident beyond the jurisdiction of the Court should be made to attend, unless there be very decided hardship in that course. But as the power to the Sheriff to issue commissions in such cases is statutory, when to exercise it must be matter for his discretion.

15. Time and Mode of Granting Commissions.—Parties should move for commissions and carry them out in such a way as to cause no unnecessary adjournments of the proof, and as little interruption to it as possible. In all cases the motions should be made before the diet for proving, so that, if refused, the party may do his best to get his witnesses to be present. It does not seem incompetent (after due notice) to grant a commission, even at a diet for proving; but in that case the party, if he get it at all, should only get it on payment of the expenses, if any, occasioned by the interruption. When the motion is made and disposed of before the diet for proving, the taking of the commission can be arranged so as to cause the minimum of interruption; for example, by making commissions for the party who begins the proof to be taken before it, and for the party who replies, after it.

The order allowing the commission should either fix the diet for taking the proof under it, or (and this is the usual form) should contain a provision that certain notice of it should be given to the parties. It also names the Commissioner, either specially or by description. If the proof is to be taken

(w) *Byres v. Forbes*, 7 Feb. 1866, 4 Macph. 888.

(x) *Stewart v. Grant*, 29 March 1867, 5 Macph. 736.

How Witnesses Cited under Commissions—Conduct of the Examination.

within Scotland the Commissioner must be either the Judge-Ordinary of the bounds, or the clerk of the Sheriff-court, or his acting depute; or a practitioner before any court of law of at least three years' standing; or a justice of peace, or other magistrate.(y) It is not necessary that the commission name the particular witnesses to be examined, though it is desirable that it should do so, or that some other way should be taken of making the order *ex facie* limit the examination to such witnesses only as may competently be examined by commission; for if the commission have no limit of this kind, more might inadvertently be done under it than could competently be done, which might vitiate the whole proceeding. The order also fixes a time for the commission to be reported.

16. How Witnesses cited under Commissions.—The provision for citing witnesses contained in the Act of 1853 (like that contained in the Act of 1838) seems applicable to the case only of their being required to attend the Court of the Sheriff. The attendance of witnesses required to attend commissioners appointed by Sheriffs, seems to be enforceable only in the same way as witnesses can be forced to attend an arbiter. The party desiring the presence of the witness proceeds by summary application to the Sheriff of the county where the witness resides to compel his attendance.(z) It is doubtful if a witness could be made to leave his own county to attend a commissioner.(a) If the commission be issued to some person in England or Ireland, the mode of making witnesses attend is contained in the Statute 6 and 7 Vict., c. 82.

17. Conduct of the Examination.—At or before the diet fixed, the Commissioner *pro forma* accepts the commission. He then appoints a clerk, to whom he administers the oath *de fidei*. The Commissioner must attend and conduct the whole proceed-

(y) A. S. 1889, § 69 (Appx. liv).

(a) *Gordon v. Neilson*, 16 July 1741,(z) *Harvey v. Gibson*, 7 July 1826, 4 M. 634.

 Commissions to take Evidence.

ings, and dictate the evidence to the clerk.(b) In the Sheriff-courts it has sometimes been the practice for the Commissioner to take the evidence (of consent) in the short method provided by the Act of 1853, but the competency of this is open to serious question, and the proof ought still to be recorded in the old formal manner, and signed by the witness, Commissioner, and clerk, on each page, and at each marginal note.(c) Each witness must be sworn, and the fact recorded.(d) The examination is taken down in the form of a narrative, and sometimes, when necessary, both questions and answers may be noted. All must be done as briefly as may be, it being the duty of the Commissioner to repress all irrelevant or impertinent matter.(e) The Commissioner has the power to put such questions as he himself thinks necessary to elucidate the matter, and is directed to record anything unusual in the behaviour of a witness.(g) He decides on all objections to evidence except confidentiality, making a note of the objection, and signing his decision on it. When confidentiality is pleaded he should report the objection to the Sheriff. In cases of other objections, it is in his power, if he think proper, to take the objected evidence on a separate paper, and to report it to the Sheriff in a sealed envelope, so that it may remain unopened until the evidence be found competent.(h)

18. Circumducing Time for Reporting.—If the report of the Commission be unreasonably delayed from any cause for which the party at whose instance it was granted can be held responsible, the Sheriff may circumduce the term for reporting. The effect of pronouncing this order is to make it incompetent for the party afterwards to ask to have the report received, and thus to cause him to lose the benefit of this method of adducing the evidence.

(b) A. S. 23 June 1852 (Appx. lxx).

(c) *Clelland v. M'Lellan*, 22 June 1851, 13 D. 504; *Dunbar v. Presbytery of Auchterarder*, 11 Dec. 1849, 12 D. 284. The Commissioner signs for a witness who cannot write.

(d) A. B. 20 Feb. 1888, 16 S. 630.

(e) A. S. 11 March 1800, § 4 (quoted in *Dickson on Evidence*, § 2030).

(g) A. S. 11 March 1800, § 7.

(h) *Dickson on Evidence*, § 2029.

Reporting the Commission—When Competent to take Proof *in retentis*.

19. Reporting the Commission.—When the evidence has been all duly recorded the Commissioner sends the report of it to the Clerk of Court. He is not bound, however, to give it up until his remuneration and that of his clerk have been paid. These are fixed by the Act of Sederunt of 1861 (Appx. ccxlii).

PROOF TO LIE IN RETENTIS.

20. When Competent to take Proof *in retentis*.—The only distinct regulation regarding the taking of proof to lie *in retentis* is contained in section 73 of the Act of Sederunt of 1839. The cases in which it contemplates the proceeding are, where the witness is about to leave Scotland, and where the testimony of the witness is in danger of being lost on account of extreme old age, or dangerous sickness.(i) Any witness may be examined in this way, including even the parties to the suit; but before allowing a party to be so examined, the Court may call upon the opposite party to waive his right to refer to the party's oath,(k)—a right which would have been forfeited had the party been adduced by his opponent in an ordinary proof.(l)

The proceeding by which a party is enabled to preserve evidence, with a view to a future action, is unknown in the Sheriff-Court, though it seems competent in the Court of Session. In the Sheriff-Court the process must be pending,(n) that is to say, the summons must have been executed before the application can be made.(o) If the application be made before the record be closed, the Court is more unwilling to grant it, and unless the urgency be great will delay the consideration of the application till afterwards.(p) This is done lest a party should try in this way to get precognitions to help him to state his case.

(i) A. S. 1839, § 73 (Appx. p. liv).

(k) *Laing v. Nizon*, 25 Jan. 1866, 4 Macph. 327.

(l) 16 Vict. c. 20, § 5 (Appx. p. ccxviii).

(n) See *Bryden v. Scott*, 14 June 1825, 4 S. 87. A. S. *ut supra*.

(o) *Cranston v. Ker*, 4 Feb. 1675, M. 12,091.

(p) *Laing v. Nizon*, *supra*,

Proof to lie *in retentis*.

21. **How Proof in retentis taken.**—The application for such a proof should be in writing, and should set forth the names of the witnesses, and the cause which is endangering the loss of their evidence. If the application be made before the record is closed it must specify the facts or fact on which the witnesses are to be examined.(q) On this application the parties are heard orally. When required by the Sheriff, the applicant must support by evidence of some satisfactory kind, the truth of the alleged cause for the application. It is not meant that the Sheriff must have formal proof on this point. In the case of old age being the alleged cause, a certificate to that effect must in general be exhibited; and in the case of sickness the certificate of a physician or surgeon, or of the minister of the parish, must be produced.

If the application be granted, the evidence is taken before a Commissioner, in the same way as other evidence is taken on commission. The provisions in the Act of 1853 for taking proofs do not apply, and it is not expedient that the attention of the Sheriff should be directed and permitted to dwell for a length of time upon evidence containing possibly a mere fraction of the case. If the Sheriff himself were to take the evidence, it is plain that the practice of sealing it up (which is invariable) would, in so far as he was concerned, be reduced to an absurdity.

24. **Effect of Proof in retentis.**—Proof *in retentis* is taken under the reservation of all the pleas of the party against whom it is taken. By appearing under it, and cross-examining the witnesses, he is not held as having passed from any, even of his preliminary pleas, or even to have agreed to appear in the process at all, if he be objecting to the jurisdiction, or be entitled to time to consider his position in regard to that.(r) Farther, the evidence cannot be used, except of consent, at the diet for proving, should proof ultimately be allowed, unless the witness

(q) A. S. 1839, § 78, *ut supra*.(r) *Moreton v. M'Donald*, 14 July 1849, 11 D. 1417.

Introductory.

is then incapable of appearing. If the witness can appear then, he must be brought forward, the proof taken formerly being regarded as merely a provisional kind of proof taken on an incomplete case. To save expense, however, it is permitted and is usual to hold the deposition as the evidence in the cause, on both parties consenting to that course.(s)

Section VII.—OF THE REMEDIES AGAINST DELAY.

DECREE BY DEFAULT.

1. *When Decree by Default Competent.*
2. *Nature of Decree by Default.*

STATUTORY DISMISSAL.

3. *When Process held as Dismissed.*
4. *The First Period of Three Months.*
5. *The Second Period of Three Months.*

6. *Whether new Action Competent.*

PROCESS CAPTION.

7. *Nature of Process Caption.*
8. *When Process Caption Competent.*
9. *Issue and Execution of the Warrant.*
10. *Stay of Execution.*
11. *Damages for Wrongous Execution.*

Introductory.—The remedies which are provided against undue delay in the Sheriff-Court are two-fold. If it happens that one of the parties is willing to proceed, and that the other will not, the former can use against the latter the sharp remedy of decree by default, in virtue of which the party who fails to proceed loses—if he do not forthwith make up for the default—his whole case, in the same way as if judgment on the merits had been pronounced against him. The other remedy applies to the contingency of neither party going on with the case, and has the effect of clearing it from the rolls of the Court. It was introduced by the Act of 1853, and superseded the old rules as to processes “falling asleep,” and its practical effect is to dismiss actions in which one or other of the parties does not take some proceeding at least once in every three months.

Connected with the remedies against delay is a subsidiary power requisite to prevent a party whose turn it is to move, from being impeded by his opponent making use of the power

(s) Dickson on Evidence, § 1953.

Decree by Default.

of borrowing the process to tie up his hands. The process caption is the very summary mode by which the return of borrowed processes is enforced and therefore falls to be considered here, as the remedy against the delays which this power of borrowing might otherwise be the means of occasioning.

DECREE BY DEFAULT.

1. When Decree by Default Competent.—A decree by default may be pronounced in two sets of circumstances. The Act of 1853 directs the Sheriff where any condescendence or defences, or revised condescendence or revised defences, or other paper, is not given in within the periods prescribed or allowed, to pronounce decree by default, unless it is made to appear that the failure arose from unavoidable or reasonable causes,—in which case he may allow the paper to be received on payment of expenses.(t) And at common law the Sheriff has power to pronounce decree by default where a party (after having appeared and lodged his summons or defences, as the case may be) fails to continue his appearance by himself or by an agent, and to attend at the necessary stages of the cause.(u) It is not proper to pronounce decree by default at once when the absence is from any not very important step, because the absence may be accidental. In such a case the advisable course is to direct intimation to the party who has failed to appear that, if he do not appear by a certain date to carry on the cause, decree by default will be pronounced against him. If, however, the party be absent from an important step, such as a debate ordered by the Court, or a proof in which he has to begin, decree by default may be pronounced at once, but even here it is preferable to order intimation lest the absence have been caused by mistake.

(t) 16 and 17 Vict. c. 80, § 6 (App. lxxiv). By "other papers" in this section must be understood other pleadings. Failure to lodge productions ordered cannot be treated as a default; it is only a ground for holding the party confessed on the point they concern—*Caledonian Rail-*

way Company v. Orr, 7 June 1855, 17 D. 812. Failing to lodge a minute ordered is a default—*Rail v. Stewart*, 18 July 1846, 8 D. 1224.

(u) See Erskine, iv, 1, 69, and Ivory's note.

 Nature of Decree by Default.

When the decree is asked for on the failure to lodge any paper, under the Act of 1853, there seems under the statute no alternative but to pronounce it. When asked in other cases it does not seem imperative on the Sheriff to pronounce it, should he consider it proper to appoint the appearing party to go on with the cause. If the party prefers going on with the cause to taking advantage of the default, he can do so; and this is sometimes done where it is of consequence to the party to have evidence preserved. In such a case the interlocutor (if the party succeeds) proceeds on the consideration of the record or proof, as the case may be.(v)

2. **Nature of Decree by Default.**—Decree by default, though it may be pronounced in the absence of a party, is not a decree in absence. It is a decree *in foro*.(x) and becomes final, like other decrees of that kind, unless appealed against at the proper stage. Being an interlocutor disposing of the merits of the cause, it is appealable at once, and in the usual way, from the Sheriff-Substitute to the Sheriff.(y) When the case comes on appeal before the Sheriff, the decree by default is not recalled as a matter of right on making good the default;(z) but it is in the discretion of the Sheriff to grant or to refuse the recall, and, if he grant it, to attach such conditions as to expenses as he thinks fit. If the decree have not been pronounced till after repeated defaults, the reponing may altogether be refused. When it is allowed it is seldom done except on condition of paying all expenses occasioned; but this payment, on the one hand, may be dispensed with where the fault proves to be fully more with the

(v) *Douglas v. Gibb*, 15 Feb. 1855, 17 D. 434.

(x) *Boak v. Watson*, 14 July 1860, 22 D. 1468; *Mackenzie v. Smith*, 26 June 1861, 23 D. 1201.

(y) *Young v. McKensie*, 19 July 1859, 21 D. 1358. The old method, by which the defaulting party appealed against the decree to the judge who pronounced

it, was incidentally abolished by the Act of 1858. The appeal was by means of a reclaiming petition, and that Act abolished all reclaiming petitions, except when addressed to the Sheriff-Depute in support of an appeal from the Sheriff-Substitute.

(z) *Arthur v. Bell*, 16 June 1866, Macph. 841.

 Statutory Dismissal of Processes.

other party,(a) and, on the other hand, may be increased by a sum to be paid as a penalty, when the mere re-imburement of expenses would not replace the other party. There is no formal condition in the Sheriff-Court, that where the default has been in lodging a paper, it must be tendered along with the appeal or the reclaiming petition; but if it were not so tendered there would probably not be much chance of the recall being granted.

There is no absolute incompetency in reponing a party a second time, even for the same default, but the attenuating circumstances would require to be very special before a Sheriff would feel himself authorised to intervene a second time.(b)

STATUTORY DISMISSAL OF PROCESSES.

3. When Process held as Dismissed.—The fifteenth section of the Act of 1853 provides that, where neither of the parties to a cause shall during the period of three consecutive months have taken any proceeding therein, the action shall, at the expiration of that period (*eo ipso*) stand dismissed. To mitigate in some measure the rigour of this provision, the Act next provides that it shall be competent for either of the parties, within three months after the expiration of the first period, to revive the action, either on showing good cause why no procedure took place, or on paying to the other party the preceding expenses. To prevent the application of the provision to cases where proceedings could not be taken, the section provides, lastly, that it shall not apply to cases in which the right under the action has been acquired by a third party, by death or otherwise, within the six months.(c)

The section applies to all causes brought in the Sheriff-Court. A special enactment exempts proceedings under the Bankruptcy Acts,(d) but it applies to other cases of sequestrations.(e) The principle has been laid down that the section is

(a) *Rutherford v. Beveridge*, 24 June 1826, 4 S. 755.

(b) *Pearson v. M'Gavin*, 29 May 1866, 4 Macph. 754; *Mather v. Smith*, 28 Nov. 1858, 21 D. 24; *Hamilton v. Christie*, 11 March 1857, 19 D. 712.

(c) 16 and 17 Vict. c. 80, § 15 (Appx. lxxvii).

(d) Bankruptcy Act 1856, § 43.

(e) *Paterson v. Monro*, 21 Feb. 1868, 6 Macph. 434. (Sequestration for rent *currente termino*.)

The first Period of Three Months.

to apply to everything of the nature of a proceeding before the Sheriff to which the Sheriff is judicially to apply his mind. The enactment applies to every cause from its commencement (g) till its termination, so long as a single step remains capable of being taken. It applies therefore to a case which has been decided on the merits, though nothing remain to be done except to tax the account of expenses.(h) Whether, if every other proceeding were completed, the enactment would apply so as to prevent the judgment from being extracted, is not quite clear, but probably it would. Applying for the extract is itself a proceeding in the cause. When the action is in such a position that the parties cannot move, the section could hardly be held to apply. Such a case might occur were an action to be kept six months at *avizandum* by a judge, or if an action were to be sisted. Similar difficulties might occur in the case of remits to accountants or others to report, where the question would arise whether the proceedings before the referee would be proceedings in the cause. They ought to be so held, because if the parties take proceedings in the proper quarter they do all that is fitting to carry on the cause. Of course, if after the referee has reported they remain idle for the requisite period, the statute will apply.(i)

4. The First Period of Three Months.—The object of the parties during the first period of three months must be to prevent the statute from applying, which is to be done by taking "any proceeding." It seems to be generally conceded that an order of Court, though not (strictly speaking) a proceeding by either of the parties, is to be held as a proceeding under the statute; but the pronouncing of an order of Court within the period is by no means essential to prevent the application of the statute.

(g) As to whether the cause commences with the service or with the enrolment, see *ante*, p. 68.

(h) *Campbell v. Blackwood*, 7 Nov. 1862, 1 Macph. 1.

(i) *Gillon v. Simpson*, 14 Jan. 1859, 21 D. 249, and see Section IX (of Judicial References), Art. 8.

Statutory Dismissal of Processes.

The lodging of such things as reclaiming petitions, answers, &c., is sufficient. Even so small a step as the appearance of the cause in the roll-book of the Court, and the marking on the margin of that book of a memorandum that avizandum has been made, is a sufficient proceeding.^(k) In short, it would appear that any pleading competently lodged, or any motion competently bringing the cause before the Court and resulting in some step, is a sufficient proceeding. The expression "any proceeding" is wide, and would seem to include almost anything done in the cause. The only limitation seems to be, that the proceeding must be competently brought within the cause—not necessarily that it must itself be a competent proceeding—but that it must be competently brought before the Court to be judicially disposed of.

5. The Second Period of Three Months.—If the first three months have been permitted to expire without proceedings, the object of the parties must be to have the cause revived within the second three months.

The first mode prescribed for doing this is by showing good cause, to the satisfaction of the Sheriff, why no procedure took place. The Sheriff sitting when the motion for revival is made is the Sheriff to whose satisfaction cause must be shown, and if he revive there is no review.^(l) What is sufficient cause will depend on circumstances. The mere consent of the parties is not enough for revival. On the contrary, the Sheriff has to be satisfied that the consent proceeds on such cause as (in the circumstances) approves itself to his mind, as a satisfactory reason why no procedure took place.⁽ⁿ⁾ But if the parties consent to the revival, and the presiding Judge, by acting on that consent, show his satisfaction, there will be conclusive evidence that the parties had shown good cause for not taking proceed-

(k) See the Lord Justice-Clerk's opinion in *Stewart v. Grant*, 29 March 1867, 5 Macph. 787.

(l) *M'Dougal v. Brown*, 13 July 1865, 3 Macph. 1079.

(n) Per Cowan in *Stewart v. Grant*, *supra*.

Whether New Action Competent.

ings. This no doubt opens the way to the defeat of the statute to a certain extent, particularly when it has been further held that to give such a consent is within the ordinary powers of an agent.(o)

The second alternative is payment to the other party of the preceding expenses in the cause. Over this the Sheriff has no control. If the party chooses to pay the expenses, the case must be revived. It was probably considered that a power given in the end of the section to the Sheriff to disallow such expenses, or any part thereof, in the account of the agent of either party, as against his client, was a sufficient check on the abuse of this provision.

It seems desirable that an interlocutor reviving the action should be pronounced before the second three months expire, but this does not seem essential; and provided the cause be shown to the Sheriff's satisfaction, or the expenses paid within the period, the interlocutor may be pronounced after its expiry.(p)

If the second three months expire without either cause being shown, or the expenses being paid, the action seems gone beyond power of recall.

6. Whether New Action competent.—It is clear that a new action can be brought after the first action has been dismissed under the statute. The effect of the statute is the same as if an interlocutor dismissing the action had been pronounced; and in the case of such an interlocutor, it is well established that a new action is not precluded.(q) This makes the penalty on not taking proceedings fall equally on both parties.

PROCESS-CAPTION.

7. Nature of Process Caption.—All processes which are bor-

(o) *Mackintosh v. Mackintosh*, 10 Nov. 1863, 2 Macph. 48; *Stewart v. Grant*, ut supra.

(p) *Stewart v. Grant*, ut supra.
(q) *Stewart v. Greenock Harbour Trustees*, 26 June 1868, 6 Macph. 954.

 Process Caption.

rowed (r) are understood to remain in the hands of the borrowing agent, and to be returnable by him on demand. If the agent fail to return the process on demand, the failure is treated as of the nature of a contempt of Court, and a summary warrant, called a process caption, is issued for his imprisonment until it be returned. It is characteristic that this extraordinary power is not regulated by any written rules of Court, but rests upon a practice, no doubt sufficiently well understood. Its use however is becoming rare; and it is being replaced by the practice of pronouncing orders appointing the borrower to return the process within a certain time, under the penalty of a fine. There are cases, however, where it is still found necessary to resort to the process caption.

8. When Process Caption competent.—A process caption is competent against every one who has borrowed a process and has failed to return it. It is the proper proceeding for forcing back a process which has been borrowed with a view to appeal, but has not been enrolled in the Appeal Court.(s) Where a long time has elapsed since the process was borrowed—a number of years for instance—caption is not the proper remedy. In such a case there is plainly no necessity for summary proceedings.(t) Although in general a receipt is given when a process is borrowed, and that forms therefore the evidence on which the caption is usually issued, it should be no objection to a process caption that it was used where the process had been taken without giving a receipt, because in such circumstances even a more summary remedy would not be unsuitable.(u) But as the object is solely to enforce the return of the process, it cannot be the proper remedy where it appears that the process has been lost or destroyed. In such a case the party who has been in-

(r) As to the privilege of borrowing a process, see *ante*, p. 9 (in regard to procurators).

(s) *Scott v. Curle*, 8 June 1841, 2 Rob. 317.

(t) *Horne v. Steele*, 18 Feb. 1825, 3 S. 550; and *M'Leod v. Hill*, *infra*.

(u) See the point raised in *Watt v. Thomson*, 18 July 1868, 6 Macph. 1112.

Issue and Execution of the Warrant—Stay of Execution.

jured is not without redress, but it must be obtained in some other way.

9. Issue and Execution of the Warrant.—The warrant is generally issued at the instance of the Clerk of Court, acting on the motion of the party aggrieved by the want of the process. The Clerk may also apply *ex proprio motu*, and it is his duty to do so whenever it is requisite to have the process, or if he has reason to fear that the process may otherwise be lost or destroyed. It would appear also that the private party can apply to the judge in his own name, without the intervention of the Clerk; but in that case he would be required to show what interest he had in having the process returned.(v)

In the usual case of the Clerk applying for it on the demand of the private party, the Clerk should take care that this demand is signed either by the party or his agent. In some counties a book is kept for the purpose of containing caption craves. It is usual to send intimation of this application to the borrowing agent, with a notice that the warrant will be issued if the process be not returned within forty-eight hours.

The warrant usually runs on the complaint of the Clerk of Court, but in some cases it is made to run on the joint complaint of the Clerk and the private party.(x) When completed it is put into the hands of the complainer, who again intrusts it to an Officer of Court for execution. In the Court of Session and in many counties, it is the practice to include in the warrant both the agent who borrowed the process and the agent's clerk who signed the receipt for it, but it is not usual to execute the caption against the latter, and as he has not the control of the process it would require very special circumstances to justify such a proceeding.

10. Stay of Execution.—Where an agent has reason to fear that caption will be applied for, he may lodge a *caveat* against it with

(v) *M'Leod v. Hill*, 16 Nov. 1826, 5 S. 1.

(x) See *Livingstone v. Beveridge*, 24 Nov. 1831, 10 S. 52.

 Process Caption.

the Clerk of Court, the effect of which will be to secure him an opportunity for explanation before the caption is issued; but where caption is competent execution will not be stayed upon a mere *caveat*.(y) The proper form of applying for stay of execution is by a note to the Sheriff—(not to the Court of Session, unless relief have been refused in the Sheriff-Court)—and the note should contain an offer of caution or consignation.(z) The amount for which caution is to be found will be partly a matter for discretion. In some cases it will be enough to find caution for all damages which may be occasioned by the sist. In others the party may be required to find caution for all loss that may be occasioned by the non-return of the process.(a) In other cases, especially if there has already been delay, a sist on caution will be refused altogether.(b) On consignation of the full sum at issue, a sist for inquiry would scarcely be refused; but it would still remain for decision on the result of the inquiry whether the caption should finally be recalled. The application for a sist is in general made by the borrowing agent, but where a person had (under a misapprehension) acted as the borrowing agent's clerk without authority to do so, he was allowed to make the application.(c)

11. Damages for Wrongous Execution.—Applications for process caption are made *periculo petentis*; and if the caption is carried through in circumstances which do not authorise it, the private party and his agent who enforced it are liable, jointly and severally, in damages to the incarcerated party.(d)

(y) *Patrick*, 3 June 1854, 26 Jur. 459.

(z) *Pagan v. Horsburgh*, 14 Feb. 1835, 13 S. 471; *Johnstone v. Dunn*, 23 Feb. 1839, 1 D. 567.

(a) *Livingstone v. Beveridge*, *supra*, note (z).¹

(b) *Fleck v. Bryce*, 25 June 1845, 17 Jur. 155.

(c) *Black v. White*, 6 Dec. 1834, 13 S. 134.

(d) *Hunter v. Kerr*, 28 March 1842, 4 D. 1175; *Horn v. Steele*, *ut supra*, note (n); *Pearson v. Anderson*, 18 July 1838, 11 S. 1008.

Interim Decrees.

Section VIII.—OF INTERIM DECREES.

The practice of pronouncing interim decrees in the Sheriff-Court, though recognised by various Acts of Parliament,^(e) is not governed by any special regulations, but is subject to the same principles as guide the Court of Session. Such decrees are pronounced either when the defender admits a sum to be due, or when it otherwise sufficiently appears that a sum is due by him. It is seldom expedient to pronounce an interim decree till the record is closed, but there is no absolute incompetency in doing so. In the Court of Session some doubt was entertained whether the clause in the Judicature Act,^(g) prohibiting the Court from giving judgment on the merits until the record was closed, did not prohibit an interim decree, but it was settled that it did not;^(h) and in the Sheriff-Court, where there is no such provision, the matter is clear. Where the defences therefore contain an admission of a sum due, interim decree for it is often pronounced. Where the pursuer is reputedly solvent, it is not a sufficient reason for refusing interim decree that the defender would like to retain the sum to keep himself safe against expenses that may be occasioned in the remainder of the process; but the pronouncing of interim decree is to some extent matter of discretion, and there are cases in which very nice considerations may arise as to whether interim decree, even for an admitted balance, ought to be given.⁽ⁱ⁾ Special leave is still required to extract an interim decree, and that leave may either be embodied in the decree or given subsequently.^(k)

(e) See, *inter alia*, 16 and 17 Vict. c. 80, §§ 13 and 24.

(g) 6 Geo. IV. c. 120, § 4.

(h) *Conacher v. Conacher*, 9 Dec. 1857, 20 D. 252.

(i) See *M'Allister v. Duthie*, 15 June 1867, 5 Macph. 912.

(k) *Buchanan v. Young*, 13 Jan. 1860, 22 D. 371; and see *Taylor v. Jarvis*, 20 March 1860, 22 D. 1031.

 Judicial References.

Section IX.—OF JUDICIAL REFERENCES.

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| 1. <i>How Judicial Reference made.</i>
2. <i>Time of Judicial Reference.</i>
3. <i>Effect of Judicial Reference.</i>
4. <i>Proceedings of Reference.</i> | 5. <i>Referee's Report.</i>
6. <i>Reference becoming Abortive.</i>
7. <i>Referee's Remuneration.</i> |
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A judicial reference is a proceeding by which the decision of a case is withdrawn from the Court, and submitted to one or more arbiters.^(l)

1. *How Judicial Reference made.*—A judicial reference must be entered into with the consent of both parties. This consent must be embodied in a minute; and the agent requires special authority before he can consent for his client.⁽ⁿ⁾ The minute refers the case to the decision of one or more arbiters, either specially named or (as is sometimes done) left to be named by the Court. If there are two arbiters, power should be given to choose an oversman, as otherwise the reference might become abortive by their differing in opinion. The reference may refer either the whole or a part of the cause,—subject always to the approval of the Judge. The minute requires to have the authority of the Court interponed to it. Until this has been done the reference is incomplete, and it is in the power of either party to withdraw from it.^(o) If, however, the interponing of authority have been accidentally omitted, and the parties have gone on with the reference, the subsequent proceedings will form a bar to either party pleading want of authority.^(p) After authority has been interponed, neither party can withdraw from the reference, or move the Court to recall it, without the consent of the other.^(q)

(l) A very full and valuable account of the Judicial Reference will be found in Mr Montgomerie Bell's *Treatise on the Law of Arbitration*.

(n) *Livingston v. Johnston*, 23 May 1830, 8 S. 594.

(o) *Reid v. Henderson*, 26 June 1841, 8 D. 1102; Bell on Arbitration, p. 267.

(p) *Fairley v. M'Gowan*, 11 Feb 1836, 14 S. 470.

(q) *Walker v. Stewart*, 14 Aug. 1855, 2 Macq. 424.

Time of Judicial Reference—Effect of Judicial Reference, &c.

2. Time of Judicial Reference.—A reference may be entered into at any stage of a process which is before the Court.

3. Effect of Judicial Reference.—Notwithstanding the reference, the process remains in Court. It may be enrolled at any time for the purpose of pronouncing orders necessary to the carrying out of the reference—such as those giving warrant to cite witnesses, diligences to recover documents, and so on.^(r) So much is the reference considered to be in Court, that it is only agents who can practise before the Court who can practise before the referee.^(s) If the process falls, the reference also falls. Under the old rules as to falling asleep, if the process fell asleep, it was more than doubtful whether anything could be done under the reference till it was awakened. Under the new forms, it is clear that when the process stands dismissed for failure to take a proceeding within three months, the reference also is dismissed, and that nothing can be done till the process is revived. Whether a proceeding in the reference is enough to prevent the statutory dismissal, is not altogether free from doubt.^(t)

4. Proceedings of Referee.—The first step of the referee is usually to accept the reference. This may be done by a docquet on the minute of reference, but it is not a necessary step, and often the only evidence of acceptance is acting.

The referee, if he considers it expedient, may appoint a clerk.^(u)

If the reference have been made before a record has been closed, the referee may very generally take this as evidence that the parties do not desire farther pleadings; but it is very much a matter of discretion what the referee may do in this respect;

(r) Bell on Arbitration, p. 272.

(s) *Ireland v. Wilson*, 25 June 1851, 13 D. 1226. The point here involved was whether the agent required to have the attorney licence.

(t) See *supra*, p. 189, and Bell on Arbitration, p. 276, note 2.

(u) Bell on Arbitration, p. 270.

Judicial References.

and so long as he acts fairly to both sides, and conscientiously, the Court will not interfere with him, unless it should be made plain that he has omitted to order pleadings in a case where it was impossible to do justice without them.(v) If the referee does order pleadings, the best way for him will be to follow the style of record used in the ordinary Court. He may, however, confine himself to appointing each party to give in a claim, stating (without argument) the facts they aver and the demands they make; and if he thinks fit, he may allow an answer to each party, or allow each party to revise his claim after he has seen that of the other.(x)

In regard to proof, the referee is again left very much to his own discretion. It is for him to consider whether he will allow proof or not; and if he act fairly and conscientiously, and not in such a manner as could only cause injustice, his decision cannot be quarrelled.(y) Even though proof have been ordered before the remit, the referee need not take it.(z) If the reference have been made to him as a man of skill, he may decide of his own knowledge after examining the subject of dispute;(a) and if he examines witnesses on matters in which he is himself skilled, he need not examine them on oath.(b) If, however, he has to examine witnesses on matters in which he is not skilled, he should follow the rules in the ordinary Court, unless the parties choose to dispense with any of the formalities; but it does not seem essential that he should proceed in this manner, for in this (as in all other matters) he is left very much to his discretion.(c)

Hearing the parties cannot in general be safely dispensed with altogether. It would vitiate the reference to hear one

(v) Compare *Mitchell v. Cable*, 17 June 1848, 10 D. 1297.

(x) Bell on Arbitration, p. 170.

(y) *Mowbray v. Dickson*, 2 June 1848, 10 D. 1121; *Miller v. Millar*, 10 March 1855, 17 D. 689.

(z) *Colquhoun v. Haig*, 13 Jan. 1825, 3 S. 424.

(a) *Johnstone v. Cheape*, 10 July 1817, 5 Dow, 247; *M'Donald v. M'Donald*, 8 Dec. 1843, 6 D. 186.

(b) *Cochrane v. Guthrie*, 30 Mar. 1861, 28 D. 865.

(c) See *Kirkcaldy v. Dalgairn's Trs.*, 16 June 1809, F.C.

 Referee's Report.

of the parties, without either hearing the other or giving him an opportunity of being heard. It is, however, altogether in the discretion of the referee to say how often, and when, and in what manner, he will hear the parties. He may hear them by themselves, or he may allow agents, or even counsel to appear for them; and he may have the argument either oral or in writing. Often the referee hears all that the parties have to say at the end of a proof or of an inspection, and this generally is sufficient.(d)

Notes of the referee's intended decision should generally be issued before pronouncing the decision itself. It is not imperative however to do so, and in cases of little difficulty or importance, notes may rightly enough be dispensed with; but as a general rule, the Court of Session has strongly recommended that they should be issued. If notes are issued, the parties should have an opportunity of expressing their views on them, either verbally or in writing.

The decision should embrace everything that is involved in the process. The referee, if he accept the reference, is bound to decide on both facts and law,(e) and to determine both the merits of the action and the question of expenses.(g)

5. Referee's Report.—The referee's final report is lodged in process, and the case is returned to the Clerk of Court. To make the report binding, it requires to have the authority of the Court interponed to it.(h) The Court, however, cannot review the referee's decision.(i) If the referee have not exhausted the case, or if his report be ambiguous, or if he have omitted some step such as he ought to have taken, the report may be sent

(d) The discretion a referee has in regard to the debate depends on the same principles as those which regulate his discretion as to pleadings and proof.

(e) *Welch v. Jackson*, 28 Dec. 1864, 3 Macph. 803.

(g) *Fairley v. M'Gowan*, *supra*; *Paul v. Henderson*, 19 Feb. 1867, 5 Macph. 613; *Ferrier v. Allison*, 28 Jan. 1843,

5 D. 456; 18 April 1845, 4 Bell's Ap. Ca. 161; *Hilton v. Walker*, 2 July 1867, 5 Macph. 969.

(h) *Gillon v. Simpson*, 14 Jan. 1859, 21 D. 243.

(i) *Mackenzie v. Girvan*, 19 Dec. 1840, 3 D. 318, and 9 Mar. 1843, 2 Bell's Ap. Ca. 43.

Judicial References.

back to him, for him to amend according to his discretion;(*k*) or, if the proceedings of the referee have been altogether irregular or corrupt, such as would invalidate an ordinary decree-arbitral, the Court may set them aside altogether;(*l*) but the Court cannot amend or alter the award itself. The decision must be the referee's decision.

6. Reference becoming Abortive.—The reference falls by the refusal of the referee to accept, or by his refusal (on just grounds approved by the Court) to go on with the reference; or by his death. It also falls if the conduct of the referee has been such as to oblige the Court to recall his appointment. In case of the reference becoming abortive everything done in it goes for nothing, and the process recommences at the point where it stood before the lodging of the minute. This result can be prevented only by the parties consenting to some other course.

7. Referee's Remuneration.—The referee is an officer of Court, and is entitled to remuneration.(*n*) The amount is fixed by the Court, usually after a remit to the auditor. If one of the parties have already paid the referee a reasonable fee, the Court will order the other party to reimburse such part of it as he may be liable for.(*o*) In one case the referee left the proportion in which his fee was to be paid by the two parties to be fixed by the Court; but the Court remitted to the referee to fix the proportions.(*p*)

The Clerk is also entitled to remuneration. The referee usually determines the amount, but as the Clerk is an officer of Court the referee's decision on this would not necessarily be final; and, if the referee chooses, he may leave that matter to be dealt with by the Court, in the same way as his own remuneration is dealt with.

(*k*) *Lord Advocats v. Heddle*, 9 July 1856, 18 D. 1211.

(*l*) *Per Deas, Hilton v. Walker*, *ut supra*.

(*n*) *Paul v. Henderson*, 19 Feb. 1867, 5 Macph. 618.

(*o*) *Edinburgh Oil Gas Co. v. Clyne's Trs.*, 6 Feb. 1835, 13 S. 413.

(*p*) *Morris v. Stewart*, 14 Feb. 1842, 14 D. 501.

Nature of Reference to Oath—When Reference to Oath Incompetent.

Section X.—OF THE REFERENCE TO OATH.

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| 1. <i>Nature of Reference to Oath.</i> | 7. <i>Form of Referring.</i> |
| 2. <i>When Reference to Oath Incompetent.</i> | 8. <i>Of Retracting and Deferring.</i> |
| 3. <i>Discretion to refuse Reference.</i> | 9. <i>Of the Examination.</i> |
| 4. <i>To whom Reference made.</i> | 10. <i>Of Re-examining.</i> |
| 5. <i>Reference either General or Special.</i> | 11. <i>Of Parties failing to attend the Examination.</i> |
| 6. <i>Time of Reference.</i> | 12. <i>Of Construing the Oath.</i> |

1. *Nature of Reference to Oath.*—At any stage of most causes either party is at liberty to abandon other means of attack or defence, and to tender a reference of the whole or any part of the case to the oath of his adversary. This right remains even after the cause is lost, so long as the cause remains in Court. The reference is considered to be an appeal to the equitable jurisdiction of the Court; and it is therefore in the discretion of the Court to sustain or to refuse it. It is understood, however, that the reference must be sustained when it is competent, unless there be good reason to the contrary. If it be sustained, it always forms the last step in regard to the matter embraced in it. The oath emitted is final in regard to the matter referred. If it admit the matter, the proof is complete, and if it do not admit, it is finally settled that the matter is not proved.

2. *When reference to Oath incompetent.*—The reference is occasionally incompetent.

To make a reference competent there must be, to begin with, a competent process.(q) If the action be not relevant a reference is incompetent;(r) and this is held though the defect in relevancy be caused only by want of specification.(s) On the same principle, special matters which could not be admitted to proof, as not falling within the grounds of action, cannot be the subject of a reference to oath.(t)

(q) *M'Farlane v. Watt*, 5 July 1828, 6 S. 1095.

(r) *M'Laren v. Buik*, 20 June 1829, 7 S. 780.

(s) *Phœnix Fire Insurance Company v. Young*, 10 July 1834, 12 S. 921.

(t) *Thomson v. Simpson*, 13 Nov. 1844, 7 D. 106.

Reference to Oath.

Matters of law cannot be referred to oath. Where the record contains a mixed question of fact and law, the course is to make a special reference referring only the matters of fact at issue.(u) Sometimes this cannot easily be done, and the reference is then made general, the oath being held conclusive only on the matters of fact.(v)

Matter which may be made the subject of a criminal indictment cannot be referred to oath if the referee object. Thus, in an action of damages for a serious assault, for which the defender would be liable to imprisonment in a criminal Court, he can decline a reference.(x) If, however, the offence be one for which imprisonment is either incompetent or in practice not awarded, the reference will generally be sustained.(y) A party who means to avail himself of this privilege must plead it when the reference is proposed, because if he does not then object the reference will be sustained.(z)

It has been doubted whether it is competent to refer matters of which the referee cannot personally know anything; but the doubt does not appear well founded. Though the party himself may not have knowledge of the matter, he may have received such information as may have quite satisfied him that his claim or defence was unfounded; and though his adversary may not have legal evidence to defeat him, it would be unfair to lay down any general rule to prevent an appeal to his conscience.

3. Discretion to Refuse Reference.—It is not imperative upon the Court to sustain the reference. Even when the reference is otherwise competent the Court exercises a discretion to sustain or refuse; and if they see reason to believe that justice is likely to be perverted by the administration of the oath, they

(u) *Taylor v. Hall*, 10 March 1829, 7 S. 565.

(v) See *Anstruther v. Wilkie*, 31 Jan. 1856, 18 D. 405.

(x) *Miller v. Brown*, 16 Feb. 1828, 6 S. 561.

(y) *M'Callum v. M'Call*, 18 Feb. 1825, 3 S. 551; and *Dickson on Evidence*, § 1549.

(z) *Conacher v. Conacher*, 1 March 1859, 21 D. 597.

To whom Reference made—Reference either General or Special.

will not give their authority.(a) This rule was applied in the recent case of *Longworth v. Yelverton*, where all the authorities were fully examined. The ground on which the reference was there refused was that the interest of a third party would be seriously prejudiced if the oath were affirmative.(b) The reference has been refused where it was apparent that the sole object was to get further delay; and in such cases, when the reference has been permitted, it sometimes has been only on some such condition as that the defender shall consign the amount at issue.(c)

4. To Whom Reference made.—In general the reference must be made to all of the opposing parties in the action, though it sometimes happens that the oath of one of a certain set of parties may be binding on all of them, or even that the oath of one who is not a party to the action may be binding upon one who is. Thus, in certain matters the oath of one partner may be binding on the rest, or the oath of a wife binding on the husband. Those cases, however, do not depend for their solution on the law of process, but on the power which the law of partnership, or the law of husband and wife, as the case may be, gives to the one party to bind the other in the transaction to which the action relates.

5. Reference either General or Special.—A general reference is a reference of the whole action, and is the only kind of reference competent after final decision on the merits.(d) So long as there is no such decision, it is competent (with the approval of the Court) to make a reference of any individual fact or facts in the case.(e) Even after proof has been led, a party may ask for judgment in his favour upon the facts he has proved, and refer the remainder of the case to the oath of his opponent.(g)

(a) *Ritchie v. Mackay*, 24 June 1829, 3 W. and S. 484.

(b) *Longworth v. Yelverton*, 10 March 1865, 3 Macph. 660; 30 July 1867, 5 Macph. (H.L.) 144.

(c) *Pattinson v. Robertson*, 4 December 1846, 9 D. 226.

(d) *White v. Murdoch*, 9 June 1812, F.C.

(e) *Moor v. Young*, 10 Dec. 1842, 5 D. 494.

(g) *Cameron v. Armstrong*, 28 June 1851, 13 D. 1256.

Reference to Oath.

6. Time of Reference.—It is irregular (if any objection be taken) to sustain a reference before closing the record and deciding on the relevancy, because until these things have been done it cannot be known whether the process is such as to make a reference competent. Doubts have been expressed whether it be competent in any case to admit the reference before the record is closed.(h) Under the old forms it was common to refer the summons alone,(i) and this is often done yet where no objection is taken; but under the present forms of process it looks as if either party could insist on a record being closed before any other step was taken.(k) The only check on the unreasonable use of this power is to find the party liable in the expenses of the proceedings if he exercises his right to a record without reasonable necessity. Sometimes the reference is made before the defender appears. In this case the order of reference has to be served upon him personally, and if he fail to appear and depone (being within the jurisdiction) he may be held as confessed.(l)

If preliminary pleas are stated, it is incompetent to refer to oath until they are disposed of. A defender who states such pleas cannot make a reference under reservation of them.(n) If a party who has stated preliminary pleas make a reference which is silent as to them, he will be held as having departed from them. In the same way, if the reference be proposed to the party stating the pleas, and he appear and depone, instead of exercising such right of appeal as was competent to him, he will be held to have waived the objections.(o) Sustaining a reference "before answer" (though it has been done)(p) is a thing contrary to the nature of the proceeding. If there is any such urgency for taking the oath that it cannot

(h) Dickson on Evidence, § 1554.

(n) *Henderson v. Smith*, 28 Feb. 1852,

(i) Stair, 4. 38. 27. The reference was sometimes embodied in the summons.

14 D. 583.

(k) *Riley v. M'Laren*, 24 Dec. 1853, 16 D. 323.(o) *Turnbull v. Bothwick*, 12 May 1830, 8 S. 735.(l) A. S. 10 July 1839, § 76 (App. lv); *Nicholson v. Macleoud*, *infra*.(p) *Grant v. Marshall*, 17 Jan. 1851, 13 D. 500.

Form of Referring.

await the disposal of the preliminary pleas, it should be taken to lie *in retentis*; (q) although, before this would be permitted, the urgency would have to be very strong.

After parole proof has been taken it was at one time held that a reference could not be sustained; but that rule has long been in disuse. A party who has renounced probation is in the same position as a party who has led proof, and he therefore can also make a reference.(r) If, however, a party has called and examined his opponent as a witness, he cannot refer to his oath.(s) But this is not held to prevent him, in an action which embraces two distinct matters, from examining him as a witness on the one, and referring to his oath on the other.(t)

After extracting judgment, reference is incompetent, but it is competent so long as extract is not actually issued. This was held where the extract had been ordered for some time, but had not been issued on account of the pressure of other business in the office.(u)

7. Form of Referring.—A reference to oath ought to be tendered by a minute, and the agent tendering it must have special authority to do so. The evidence of this authority may be either the signature of the party on the minute, or a separate mandate produced with it; or the party may attend the examination and judicially adhere to the reference.(v) If, through some mistake, the minute be omitted, the mistake will not be fatal to the reference if all the other forms have been attended to, and the intention of the party to refer, and his knowledge of the reference, be clear from some such distinct act as his presence at the examination.(x)

After the minute, the next step is for the reference to be

(q) *Riley v. M'Laren*, *supra*.

(r) *Anstruther v. Wilkie*, 31 Jan. 1856, 18 D. 405.

(s) 16 and 17 Vict. c. 20, § 5 (App. ccxviii).

(t) *Dewar v. Pearson*, 27 Feb. 1866, 4 Macph. 493.

(u) *Aikman v. Aikman's Trs.*, 24 Jan. 1868, 6 Macph. 277.

(v) A. S. 1839, § 84 (App. lvi).

(x) *Hewit v. Pollok*, 24 Nov. 1821, 1 S. 178.

Reference to Oath.

sustained by an interlocutor of the Sheriff. This step is imperative; and if the oath be emitted under anything less solemn than an express order of the Court, it will not constitute a judicial reference.^(y) When this interlocutor is moved for, any objection to the reference should be stated; for if the objection be not now stated, the reference will be sustained, and the objection be held as waived. This holds more especially when the objection is merely to so trivial a matter as the form of the minute.^(z)

When the reference has been sustained, a day is assigned for the party to appear and depone. The oath is directed to be taken before the Sheriff, but if he cannot attend, or in case of special emergency, he may appoint a commissioner.^(a)

8. Of Retracting and Deferring.—At any time before the oath has been emitted, the party referring may retract the reference on paying the expense which the other party has been put to by this change.^(b) It is a condition, however, of permitting this, that the other party have not been prejudiced by what has taken place. If, for example, he has been deprived by death or otherwise in the interval of the evidence of a material witness,^(c) the reference cannot be retracted.

Deferring is a proceeding (now almost unknown) by which a party to whose oath a reference has been made declines it, and refers the case back to the oath of the proposing party. The proceeding is still competent, and it is regulated in the same way as an original reference. When it is used, the judge has a discretionary power of ordaining either of the two parties to make oath, whom he has ground to think had the best opportunities of knowing the fact.^(d)

^(y) See the opinion of the Court in *Nicholson v. Macleoud*, 23 Nov. 1810, F.C.

^(z) *Broom v. Edgley*, 31 May 1843, 5 D. 1087.

^(a) A. S. 1839, § 79; and see *Forman v. Bookless*, *infra*.

^(b) A. S. 1839, § 80; *Chalmers v. Jackson*, 18 Feb. 1813, F.C.; *Binnie v. Mack*, 28 Jan. 1832, 10 S. 855.

^(c) *Gulbraith v. M'Neil*, 26 Nov. 1823, 7 S. 63.

^(d) *Stair*, 4, 44, 13; *Erskine*, 4, 2, 8.

Of the Examination—Of Re-examining.

9. Of the Examination.—When the parties appear before the Sheriff the deponent is put upon oath.(e) The examination then proceeds at the instance of the referring party, who may ask such relevant questions as he pleases. So long as he keeps to the case, the only limit upon his discretion is the power which is given to the deponent to decline to answer special questions after having answered general questions—a power given to the deponent to prevent his being led into perjury by first answering general questions in the negative, and then being obliged to admit circumstances which contradict himself.(g) The deponent cannot decline to answer special questions when they are put first. The examining party may show to the deponent any documents which would be admissible were he being examined as a witness, and may examine him in regard to their contents.(h) The referring party is not bound to go over the whole case, but may stop his examination when he pleases. The Sheriff ought then to ask such questions as he may think right for clearing up the case;(i) and on that point he may receive suggestions from the deponent's agent. The deponent, it should be mentioned, is entitled to have an agent present, not only for the purpose of suggesting questions to the Sheriff, but also for the purpose of assisting his client with references to documents, and of objecting to incompetent questions.(k)

The deposition is recorded in the old form, that is to say, it is dictated by the Sheriff to the Clerk of Court, and then each page or marginal note is signed by the Sheriff and the deponent in the same way as in the case of a proof by commission.(l)

10. Of Re-examining.—In certain cases it has been permitted

(e) If the deponent has conscientious motives for not taking an oath, his affirmation may be taken; 28 and 29 Vict. c. 9, § 2 (App. ccxix).

(g) *Heddie v. Baikie*, 16 Jan. 1841, 8 D. 370.

(h) *Boyd v. Carr*, 17 June 1848, 5 D. 1218.

(i) *Soutar v. Soutar*, 5 Dec. 1851, 14 D. 140.

(k) *Blair v. M'Phin*, 4 July 1856, 18 D. 1202.

(l) *Forman v. Bookless*; 27 Feb. 1861, 2 Macph. 787.

Reference to Oath.

to have the examination re-taken. This has been allowed where the first examination did not exhaust the reference; (n) where the deponent had not been examined in regard to certain statements in his record which it was desired to read along with his deposition; (o) where the deposition was confused or ambiguous; (p) or, lastly, where, through an irregularity, the deposition had been emitted in the absence of the referring party. (q) The re-examination, however, will not, any more than the examination, be allowed as matter of right. It is, on the contrary, a very exceptional proceeding.

11. Of Parties failing to attend the Examination.—Should the party making the reference fail to go on with it by taking a day for examining his opponent, the Court may circumduce the term for referring; and when this is done, the party, if he do not get himself reponed against the order, loses his right to refer. If the failure to go on with the reference have been repeated, and the party takes no other steps, the Court may decide against him by default. (r) If the referring party, after getting a day fixed for the examination, fail to appear at it, the Sheriff may take the deposition in his absence.

If the party to whom the reference is made fail to appear at the examination, he may be held as confessed. If the diet, however, have been fixed in his absence, it must be proved that he or his agent received notice of the appointment before this can be done. (s) The effect of holding him as confessed is the same as if he had appeared and admitted the matters referred to him.

Parties may be reponed against circumduction, or holding as confessed, upon showing sufficient cause to the Sheriff for the failure, and on paying such expenses as he may modify. (t)

(n) *Paterson v. Thomson*, 20 Feb. 1830, S. 571.

(o) *Young v. Pollock*, 25 May 1832, 10 S. 570.

(p) *Erskine*, 4. 2. 15.

(q) *Peacock v. Smile*, 5 July 1828, 6 S. 1081.

(r) See *ante*, Section VI. Art. 4, p 175.

(s) A. S. 1839, § 76 (Appx. iv).

(t) A. S. 1839, §§ 81 and 82.

Of Construing the Oath.

No precise time seems to have been fixed within which the demand to be reponed must be made, but it should be made on the first calling of the cause at which the party is present; for if a party go on to litigate on other points he will necessarily be held as having waived his claim to be reponed.(u)

12. Of Construing the Oath.—After the oath has been taken the only question in the cause in regard to matters embraced under the reference, is what has been sworn. There is no room for questioning whether the oath is true or false, or whether it be consistent or inconsistent with other statements made by the party, either on record or in letters or other writings under his hand. And there is no room for either explaining, supplementing, or detracting from the oath by such statements. If it be desired to have benefit from such statements, they must be incorporated in the deposition, by putting them before the deponent at the examination, and examining him in regard to them. It is not enough, however to examine him as to whether he authorised or wrote them; he must be examined as to their contents; and his explanation of them, whatever it may be, has to be accepted in the process as true.(v)

Where the deposition is ambiguous or contradictory, the Court must interpret it so as to obtain its true meaning, though that possibly may not be the meaning which the deponent would like to have attached to it. If the deposition contain materials sufficient to show that the debt is due, the oath will not be held as negative because the deponent has said that it was not due in answer to the general question.(x) The principles to be recollected in interpreting are, that the oath is to be assumed as true, and that, even though it should be very apparent that it is false, it is the only evidence which can be looked

(u) Compare *Grant v. Macgregor*, 20 June 1839, 1 D. 1048, where the Court refused to repon the representatives of a deceased party who, when in life, had neglected to get himself reponed.

(v) *Gordon v. Pratt*, 24 Feb. 1860, 22 D. 903.

(x) *Grant v. Wishart*, 17 Jan. 1845, 7 D. 274.

Reference to Oath.

at, and that the burden of the proof is on the referring party. But while the oath is to be taken as conclusive on all the matters referred, it is not to be held as conclusive in regard to everything which a deponent may choose to say. This makes it necessary to distinguish between intrinsic and extrinsic statements—that is to say, between statements relating to the matter at issue and statements which do not relate to it. The nature of this distinction can best be illustrated by an example. In an action for debt everything relating to the constitution or the subsistence of the debt is intrinsic to the oath; but any statement, such as that the debt was compensated by a different debt,^(y) is extrinsic; and the only way here is to give decree for the debt sued for, and to allow the deponent to sue in like manner for the debt due to him.

CHAPTER IV.

OF APPEALS IN ORDINARY ACTIONS FROM THE SHERIFF-SUBSTITUTE TO THE SHERIFF.

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| 1. <i>Competency of Appealing.</i> | <i>ciding on the Admissibility of Evidence.</i> |
| 2. <i>List of Appealable Interlocutors.</i> | 8. <i>Appeals against Interlocutors disposing of Objections to the Taxation of Accounts.</i> |
| 3. <i>Engrossing the Appeal.</i> | 9. <i>Powers of the Sheriff on Appeal—Cross Appeals—Opening up Record.</i> |
| 4. <i>Lodging Reclaiming Petition and Answers.</i> | 10. <i>Powers of Sheriff-Substitute pending the Appeal.</i> |
| 5. <i>Of desiring to be heard Orally.</i> | |
| 6. <i>Of including prior Interlocutors in an Appeal.</i> | |
| 7. <i>Appeals against Interlocutors de-</i> | |

1. *Competency of Appealing.*—The right of appeal from the Sheriff-Substitute to the Sheriff did not exist at common law. The Sheriff-Substitute, being the deputy of the Sheriff, acted in his name, and the decision was in law the decision of the Sheriff.^(z) The right of appeal was of gradual introduction.

(y) *Thomson v. Duncan*, 10 July 1855, 17 D. 1081.

(z) *Erskine*, 1, 2, 14. The practice of interlocutors running in name of the

“Sheriff-Substitute” dates only from the end of the last and the beginning of the present century.

Competency of Appealing.

It is a comparatively recent matter the holding of an interlocutor to be final before giving out the "extract," or official copy to the parties; and the practice of asking the judge to reconsider his decision (reclaiming) until he prohibited farther petitions of the kind, was universal.^(a) When the Sheriff was in the county at the time of presenting, he disposed of those petitions; and when he was not in the county, it became frequent to ask the Sheriff-Substitute to take the opinion of the Sheriff before disposing of them. With such requests the Sheriff-Substitute naturally complied, as he held office at the Sheriff's pleasure. The next step was directly to crave the Sheriff's opinion; and on this, the Sheriff-Substitute pronounced an interlocutor allowing the appeal. The last stage prior to the present forms was the system embodied in the Act of Sederunt of 1825, and continued by that of 1839, in which the obtaining of special leave to appeal in each case was changed to a general right to appeal, subject to a power in the Sheriff-Substitute to "refuse to allow" the appeal where, in his opinion, the interlocutor ought to be carried into immediate effect.^(b)

As matters stood under the Act of 1839, parties had the power of appealing in all proceedings conducted under it against any judgment of the Sheriff-Substitute, whether interlocutory or final, by which they might think themselves aggrieved.^(c)

By the Act of 1853 the power of appealing was so far limited as to make it incompetent, before the pronouncing of an interlocutor disposing in whole or in part of the merits of the cause, to appeal against any interlocutor which does not (1) dispose of a

(a) Erskine, 4, 3, 5. In 1709, the Court of Session made an order limiting the number of reclaiming petitions against interlocutors pronounced "in presence" to two. Down to 1853, it remained competent to reclaim once to the Sheriff-Substitute against most of his interlocutors. In some of the counties the number was not reduced to this till 1825. In Kincardineshire the number remained without limit of any kind till 1817.

(b) A. S. 10 July 1839, § 98 (App. lviii). This system had been at work under local regulations for varying periods before 1825, but not for a long time. The Kincardineshire regulations of 1804 deal only with reclaiming petitions, and know nothing of appeals, though they were informally in use before that.

(c) A. S. 10 July 1839, § 98 (App. lviii). A. S. 12 Nov. 1825, Chapters XIII and XIV.

List of Appealable Interlocutors.

dilatory defence, (2) sist process, (3) allow a proof, (d) or (4) decide upon the admissibility of evidence. (e) Until, therefore, an interlocutor is pronounced falling under one of these four classes, or being in itself an interlocutor disposing in whole or in part of the merits of the cause, there is no right of appeal. As soon, however, as the first appealable interlocutor (not being an interlocutor on the admissibility of evidence) is pronounced, there is a power of appealing not only against the interlocutor in question, but against all prior interlocutors. (d)

Although not expressly said, it is evidently meant, and in practice is so understood, that when an interlocutor is pronounced appealable under the Act of 1853, there is no power (such as was contained in the Act of Sederunt of 1839) to refuse to allow the appeal on the ground of its being expedient to carry the order into immediate execution.

The limitation in the Act of 1853 of the power of appeal applies only to interlocutors pronounced before an interlocutor has been pronounced disposing in whole or in part of the merits of the cause. The Act says nothing about the interlocutors pronounced after that, and it therefore must have intended to leave them to be dealt with on the old footing. In practice this fact is generally overlooked, and it is not noticed that when an interlocutor disposing in part of the merits is pronounced, it renders thereafter the limitations on the power of appeal contained in the Act of 1853 inapplicable to the cause; and makes it thereafter competent to appeal every interlocutor, subject to the right of the Sheriff-Substitute to refuse to allow the appeal.

2. List of Appealable Interlocutors.—To the appealable interlocutors above mentioned there fall to be added, as being dealt with under special provisions, appeals by witnesses against orders to produce documents or to disclose evidence, and appeals against the disposal of objections to the taxation of accounts.

(d) 16 and 17 Vict. c. 80, § 19 (App. xxix).

(e) *Ib.* § 17.

(f) See note (d), p. 211.

List of Appealable Interlocutors.

The result is to present the following table of appealable interlocutors :—

- (1) Interlocutors disposing of *dilatory defences*.
- (2) Interlocutors *sisting process*.
- (3) Interlocutors *allowing proof*. Under this are included interlocutors renewing an allowance of proof of which a party has neglected to avail himself;(g) but it does not appear to include an interlocutor adjourning (or still less refusing to adjourn) a proof, for redress against which, if wrong, a party must wait till the pronouncing of the first appealable interlocutor thereafter.
- (4) Interlocutors deciding upon the *admissibility of evidence*.
- (5) Interlocutors deciding questions of *confidentiality* against witnesses.(h)
- (6) Interlocutors disposing, in whole or in part, of the *merits of the cause*. Under this is included an interlocutor giving interim decree.(i) An interlocutor ordering consignation would fall under this class, as it disposes of the merits to the effect of saying that the consigner has no right to the possession of the fund to be consigned. Judgments by default fall also under this class.
- (7) Any interlocutors pronounced *prior* to an interlocutor falling under the first, second, third, and sixth of the above classes, of which parties complain at the time of taking an appeal against the first interlocutor belonging to those classes pronounced thereafter. From this must be excepted interlocutors reviving actions, for the reasons explained formerly (*ante* p. 190).
- (8) Interlocutors pronounced *after* a judgment disposing in whole or in part of the merits of the cause, against

(g) *Murphy v. M'Keand*, 15 Feb. 1866, 4 Macph. 444.

(h) As these appeals concerned the witnesses only, they were noticed in connection with the proof, *ante*, p. 102, art.

11. When the parties complain of such interlocutors they appeal as against interlocutors falling under the fourth class.

(i) *Ante*, Chap. III, Sec. VIII.

Engrossing the Appeal—Lodging Reclaiming Petition and Answers.

which the Sheriff-Substitute does not refuse to allow an appeal. From this must be made the same exception as from the preceding class, of interlocutors reviving actions.

- (9) Interlocutors disposing of objections to taxation of accounts of expenses.

It will be convenient to class as ordinary appeals the appeals against the interlocutors forming the first, second, third and sixth of the preceding classes. These form the kind of appeals most commonly taken, and the Act of 1853 provides for all of them being taken in the same manner.

3. Engrossing the Appeal.—The party who proposes to appeal must, within seven days from the date of the interlocutor, engross and sign under the interlocutor appealed against the words—"I appeal against this interlocutor." (*k*) If the interlocutor is pronounced one day, but not signed till afterwards, the date of signing will be the date from which the days will run. (*l*) If it have been signed at a distance from the Court the date of its being received in the office (which will be the date of its being entered in the minute-book) must be held as the true date. Should the interlocutor sheet from any cause not be in the hands of the clerk, the party should lodge a notice of appeal, which would necessarily be equivalent, as the clause about the appeal being written under the interlocutor cannot, in the case of the unavoidable infringement of it, be taken as more than directory. If a party wants to appeal against part only of an interlocutor, he may qualify his appeal accordingly, but the effect will not be more than to show what he wishes: it will not limit the powers of the Sheriff in dealing with the appeal. An agent signing should add to his signature words showing for whom he appeals.

4. Lodging Reclaiming Petition and Answers.—Within eight

(*k*) 16 and 17 Vict. c. 80, § 16.

(*l*) *Cleland v. Clark*, 15 Feb. 1849, 11 D. 601.

Of desiring to be heard Orally.

days after the expiry of the appealing days,(n) the party may lodge a reclaiming petition. The time for lodging this petition may be prorogated under section 6 of the Act of 1853.(o)

The reclaiming petition must recite *verbatim* the interlocutor reclaimed against.(p) In practice, this is understood to mean that the note also must be recited. It must also bear (on the margin) the true date of the interlocutor. The petition must not contain quotations from the proof or from the writings in process, except when absolutely necessary; but suitable references are to be made.(q) The party reclaiming is free to use all relevant arguments to impugn the interlocutor.

If a reclaiming petition is lodged, the Sheriff-clerk forthwith transmits the process to the Sheriff, who may then (either with or without ordering answers) dispose of the appeal. If answers are ordered, they must be framed on the same principles as reclaiming petitions, except that the interlocutor must not be recited. The time for lodging them may be prorogated in like manner.

5. Of desiring to be heard Orally.—An appellant who prefers it may, in place of lodging a reclaiming petition, lodge a notice with the Sheriff-clerk, craving to be heard orally before the Sheriff on the judgment or judgments appealed from. This notice must be lodged within the eight days allowed for reclaiming. In practice it is usually written on the interlocutor sheet. If the Sheriff grants the desire to be heard orally, he appoints the case to be heard at his next sittings. He has power however, in cases requiring extraordinary despatch, to refuse the desire, and to proceed by way of reclaiming petition and answers.(r)

The statute appears, in the concluding portion of section 16,

(n) It is not very clear whether the statute meant this period to run from the expiry of the appealing days, or from the date of the actual engrossing, and accordingly the more liberal interpretation is

generally given; 16 and 17 Vict. c. 80, § 16.

(o) See *ante*, p. 74, art. 3.

(p) A. S. 1839, § 93.

(q) A. S. 1839, §§ 86 and 93.

(r) 16 and 17 Vict. c. 80, § 16.

Of including prior Interlocutors in an Appeal.

to recognise the competency of the party in whose favour the appealed interlocutor has been decided, asking to be heard in support of it even when the other party does not ask to be heard against it. The Sheriff, however, can hardly be supposed to be obliged to grant this request in all cases; for if he saw no ground for disturbing the interlocutor no litigant could complain of having an interlocutor affirmed with less trouble to himself than he was willing to take.

It is not competent in any case to have both written and oral pleadings.(s)

If the appellant do not lodge a reclaiming petition, and neither party craves to be heard, the Sheriff proceeds to dispose of the appeal on the merits; but, should he find it necessary, he has power *ex proprio motu* to order argument, oral or written as he may think fit.(t)

6. Of including prior Interlocutors in an Appeal.—It is not till the first appealable interlocutor that is unfavourable is pronounced, that a party is bound to appeal against prior interlocutors, under the penalty of being held to acquiesce if he do not. It is evidently not intended that a party should *pro forma* appeal against an interlocutor of which he does not complain, in order to get at a prior interlocutor of which he does complain. Should the other party, however, appeal, he should then appeal against the prior interlocutors to which he objects—it being clearly proper that such matters should be brought up at the first legitimate opportunity.

It is a question of some importance whether, under the power given to bring up all prior interlocutors at the time of an appeal, it is competent to bring up interlocutors which were themselves appealable at the time of being pronounced. If this were permitted, it would often be practicable to carry a case to a final conclusion before the Sheriff-Substitute as judge ordinary, before taking it to the Sheriff as judge of appeal. It is very doubtful however whether this power has been given. Before

(s) 16 and 17 Vict. c. 80, § 16.(t) *Ib.* § 12.

Appeals against Interlocutors deciding on the Admissibility of Evidence.

1853 it was held that every interlocutor must be appealed against at the time of pronouncing, under pain of its being held final.^(u) The Act of 1853 made a restriction that it should not be competent to appeal until a certain event happened, and coupled that restriction with a qualification; but it did not remove the old penalty on failure to appeal when appeal was competent. The general practice is believed to be in accordance with this view, and to hold that if a party has power to object at the time of pronouncing to an interlocutor, and does not then exercise it, he has waived his right to object, and the interlocutor becomes final in the cause.

An appellant at the time of appealing against an appealable interlocutor is not required by the statute to mention specifically in his appeal all the prior interlocutors to which he objects. It may be advisable that he should do so, because it tends to clearness, and because, in the event of there being no written or oral pleading, it points out the interlocutors complained of to the Sheriff and to the opposite party. But the statute does not require, on pain of nullity, the various interlocutors to be specially mentioned in engrossing the appeal. On the contrary, it expressly says that, after writing below an appealable interlocutor the words "I appeal against this interlocutor," it shall be competent to lodge a reclaiming petition against that judgment and against any prior judgment which may under the Act be then appealed; and in the case of the notice desiring oral argument similar terms are used. This seems the correct reading of the statute, and opinions have been given which support it.^(v)

7. Appeals against Interlocutors deciding on the Admissibility of Evidence.—Prior to closing the proof, it is incompetent to appeal against any ruling by the Sheriff-Substitute on the admissibility of evidence; but on the proof being declared closed, or within seven days thereafter, it is competent to appeal

(u) See *Brown v. Gardiner*, 26 May 1823, 2 S. 319.

(v) *Caledonian Railway Co. v. Orr*, 7 June 1855, 17 D. 812.

Powers of the Sheriff on Appeal—Cross Appeals—Opening up Record.

against all or any of such rulings. This appeal is usually written below the interlocutor declaring the proof closed.(x) On receiving the appeal, the Sheriff is directed to pronounce such judgment as shall be just, and to appoint any evidence which he may think ought not to have been rejected to be taken before the case shall be advised on the merits. There is thus no opportunity for argument, oral or written, on such appeals, except when the Sheriff (under his general powers) thinks fit to order a debate.(y)

8. Appeals against Interlocutors disposing of Objections to the Taxation of Accounts.—Appeals against interlocutors disposing of objections to the taxation of accounts are the only appeals in use to be made which are still regulated by the Act of Sederunt of 1839, § 109.(z) The appeal must be taken within forty-eight hours. No reclaiming petition is competent;(a) but the Sheriff might, under his general powers to that effect,(y) order oral argument if he thought fit. Such argument, however, could not be demanded as matter of right.

9. Powers of the Sheriff on Appeal—Cross Appeals—Opening up Record.—The taking of an appeal under the Act has the effect of preventing the interlocutors appealed against from becoming final, and the Sheriff can therefore recal them; and he is not limited, after doing that, to doing merely what is requisite to dispose of the matter embraced in the appeal, but may pronounce any interlocutor which he thinks right. Cross appeals, although convenient, seem to be unnecessary. Thus, where a proof was allowed, and the pursuer appealed, and maintained

(x) The Act, by a wide use of the word, or by a mistake, calls all such rulings "interlocutors;" and the strict reading of the Act would therefore require the appeal to be written on the proof, below the place where the rulings are minuted; but this would be very inconvenient, and is never done. Sometimes the appeal is

written at the end of the Notes of Evidence.

(y) 16 and 17 Vict. c. 80, § 12 (App. lxxvi).

(z) *Williamson v. M'Lachlan*, 19 July 1866, 4 Macph. 1091.

(a) A. S. 10 July 1839, § 109 (App. lx).

Powers of Sheriff-Substitute pending the Appeal.

that no relevant defence had been stated, the defender was allowed, without a cross appeal, to object also to the proof being allowed, and to maintain that the action should be dismissed.(b)

On an appeal on any point, the Sheriff may open up the record if it appear to him not to have been properly made up.(c)

10. Powers of Sheriff-Substitute pending the Appeal.—When an appeal has been competently taken, it has the effect of entirely removing the process from the Sheriff-Substitute, and of making it incompetent for him to pronounce any interlocutor.(d) No power is conferred on the Sheriff-Substitute to regulate possession during the appeal. If a plainly incompetent appeal be engrossed there is truly no appeal, and it is the Sheriff-Substitute's duty, if asked, to proceed with the cause. But if there be any doubt as to the competency of the appeal, he must not do so, but must leave that question to be decided by the Sheriff.

(b) *Swan v. Buid*, 21 Jan. 1834, 12 S. 316.

(c) 16 and 17 Vict. c. 80, § 16 (App. lxxviii).

(d) *Martin v. Murray*, 22 Dec. 1837, 16 S. 298. There is an express exception in the case of appeals by witnesses on confidentiality (*ante*, p. 102).

Extract.

CHAPTER V.

OF THE EXTRACT OF THE DECREE, AND OF EXECUTION,
IN THE ORDINARY ACTION.

EXTRACT.

1. *Nature of Extract.*
2. *Competency of Extract.*
3. *Time of Extract.*
4. *Form of Extract.*
5. *Warrant embodied in Extract.*
6. *Second Extract.*
7. *Expense of Extract.*

EXECUTION.

8. *Different kinds of Execution.*
9. *By whom Execution carried out.*
10. *Execution beyond the County.*

CHARGE.

11. *The Charge.*
12. *At whose Instance.*
13. *Requirements of the Charge.*
14. *Service of the Charge.*
15. *Execution of the Charge.*
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IMPRISONMENT.

17. *When Imprisonment Competent.*
18. *Warrant of Imprisonment.*
19. *Apprehending the Debtor.*
20. *Imprisonment of the Debtor.*
21. *Alimenting the Debtor in Prison.*

22. *Liberation of the Debtor.*
23. *Re-imprisonment of Debtor.*

POINDING AND SALE.

24. *Nature of Poinding.*
25. *What may be Poinded.*
26. *Time of Poinding.*
27. *How Poinding Executed.*
28. *Person interrupting Poinding.*
29. *Conjoining Creditors.*
30. *Reporting the Poinding.*
31. *Custody of Goods between Poinding and Sale.*
32. *Fixing and Advertising the Sale.*
33. *Conduct of the Sale.*
34. *Report of Sale.*
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ARRESTMENT AND FURTHERCOMING.

36. *Arrestment in Execution.*
37. *What may be Arrested.*
38. *On whom Arrestment served.*
39. *How Arrestment used.*
40. *Effect of Arrestment.*
41. *Prescription of Arrestment.*
42. *Action of Furthercoming.*
43. *Arrestment of Ships.*

EXTRACT.

1. *Nature of Extract.*—The “Extract” is the official copy of the decree on which the successful party proceeds to execution against the unsuccessful party. At one time it was customary for it to contain a narrative of nearly all the proceedings in the action, but now it is confined within more reasonable limits, setting forth the parties and the sum or sums decreed to be due by the one to the other, and concluding with a warrant for execution. The form of the first part of the

Competency of Extract.

extract is regulated by an Act of Sederunt passed in 1830,(a) and the form of the warrant by the Personal Diligence Act.(b)

Extracts for execution are issued only to the parties in right of the judgment, but "any party interested, if he shall see cause, may demand a full extract, or an authenticated copy by the clerk, of all or any part of the proceedings," on payment of the prescribed fees.(c) Extracts of this kind are frequently obtained by parties who require to use the proceedings as evidence in other courts.

2. Competency of Extract.—All final judgments may be extracted. They may be extracted though nothing should be found due by them, simply for the purpose of bringing the action to its proper ending. In order to fix what decrees are extractable, the technical word "decern" must always be used in some part of an extractable interlocutor.(d) If the decree be an interim one, it cannot be extracted without special leave from the judge.(e) Where the interlocutor, though final on the merits, has not finally disposed of the expenses, the successful party may have an extract, on agreeing to treat the interlocutor as final, by waiving his claim to the expenses.(g)

Extract cannot be issued unless all the material parts of the process required to authorise it are in the hands of the Clerk of Court, to remain and show on what grounds and warrants the extract is founded. What is a material part of the process in this sense will depend on circumstances. The summons, as showing the parties and the conclusions dealt with, is a part of the process which is always essential. If

(a) A. S. 27 Jan. 1830; Alexander's Acts of Sederunt (first series), p. 890.

(b) 1 and 2 Vict. c. 114, § 9 (App. vii).

(c) A. S. 27 Jan. 1830, *ut supra*.

(d) *Anderson v. Moon*, 1 June 1836, 14 S. 863.

(e) *Taylor v. Jarvis*, 20 Mar. 1860, 22 D. 1031. A special enactment allows

interim decrees in the Court of Session to be extracted without special leave.

(g) This is done by minute, and (unless the party have done something to make his opponent believe that he was to go on in the usual manner) need not be intimated to the unsuccessful party; *M'Lachlan v. Campbell*, 28 Feb. 1846, 8 D. 574.

Extract.

the original summons be lost there can be no extract, unless with the consent of the opposite party. When a summons is lost, and consent to hold a copy as an original is refused, the only remedy is to have a proving of the tenor.^(h) Equally essential would be the original interlocutor sheets; and it may be doubted whether their loss could be made up by proving their tenor. Probably there are no other parts of the process which are in every case necessary. Where the summons and the interlocutor sheet showed in full what had been done, the loss of a reclaiming-note (in a Court of Session case) was held immaterial.⁽ⁱ⁾ But it is easy to conceive cases where the loss of some other step would be material—for instance, where the final judgment sustained a particular plea, and the pleading necessary to show what it was had gone amissing.

3. Time of Extract.—Until the passing of the Court of Session Act of 1868, the time for issuing extract was regulated by the Act of Sederunt of 1839. Under it the time for extracting was six free days after final judgment, provided that, if the taxation of the expenses was contained in a separate interlocutor, forty-eight hours had elapsed from its date without appeal being taken.^(k) The Sheriff had also power to allow extract to be issued at an earlier date, or to supersede it till a later period. The Court of Session Act, in dealing with appeals,^(l) has extended the normal interval between the date of judgment and that of extract to twenty days; and although it has left the power to supersede extract untouched, its absolute language has taken away the power which the Sheriff had of specially allowing extract in a shorter than the normal period. The provision seems to apply only to judgments in causes which may be appealed—that is, to causes exceeding in value

(h) *Mair v. Inglis*, 18 Jan. 1862, 24 D. 312; *Forsyth v. Aird*, 13 Dec. 1853, 16 D. 205. The provision in § 15 of the Court of Session Act 1868, as to holding a copy equivalent, seems not to apply to the Sheriff-Court.

(i) *White v. Arthur*, 28 June 1866, 8 Macph. 1025.

(k) *Williamson v. M'Lachlan*, 19 July 1866, 4 Macph. 1091.

(l) 31 and 32 Vict. c. 100, § 68 (App. ccxi).

Time of Extract.

the sum of £25. The Act gives the period of twenty days for the purpose of appealing, and its terms appear to show, though not so clearly as could have been wished, that the delay is not to be given where it could serve no purpose. In appealable actions the twenty days would seem to run from the date of an appealable judgment,^(m) and an appeal taken even after the twenty days, if before actual extract, would render extract incompetent. The result thus is, that there are two times now for issuing extract, one for causes in which appeal to the Court of Session is competent, and another for those in which it is not; and that the power of allowing immediate extract, or extract before the normal time, is now competent only in causes which cannot be appealed to the Court of Session.

The power of superseding extract is one analogous to that of sisting a process. Its competency is admitted, but it is rarely exercised, and only in cases where the debtor is entitled to reasonable time for some purpose before being called on to pay.⁽ⁿ⁾

The powers of shortening or lengthening the period for extract, are always exercised by an instruction embodied in the decree; and as the propriety of exercising them depends always on the merits of the cause, it would not be safe to pronounce such an order at an after period, because after the merits were settled it would be irregular to re-open a discussion on them.

The question whether extract is competent after the lapse, since the final judgment, of the period requisite for the statutory dismissal of the action, has been already noticed.^(o)

In any question as to the time at which an extract was issued, it will always be presumed that it was not issued prematurely, but it will be open to the person against whom execution is being done to state the objection without its being necessary for him to bring a reduction of the extract.^(p)

(m) See 16 and 17 Vict. c. 80. § 24
(App. lxxx), and *infra*, Part VI.

(n) *Thomson v. Duncan*, 10 July 1855,
17 D. 1082.

(o) *Ante*, p. 189.

(p) *Badger v. Blantyre*, 16 Nov. 1844,
17 Jurist, 53; *Grindlay v. Saunders*, 5
March 1830, 8 S. 642.

Extract.

4. Form of Extract.—The extract must conform to the judgment and prior proceedings by which it professes to be authorised.(q) The form of extract contained (in so far as the first part of it is concerned) in the Schedule to the Act of Sederunt of 27th January 1830, and (in so far as the warrant annexed is concerned) in the Personal Diligence Act, is to be followed as nearly as may be, but trifling deviations will not affect the validity. Thus, though the statute contemplates that in the warrant the debtor is again to be mentioned by name, and that the sum is to be repeated specifically, a warrant referring to them as previously shown in the earlier part of the extract is not fatally irregular.(r) It is enough if the dates of the judgments ordering payment of the principal sum and expenses in the first instance be given, without giving the dates of judgments affirming them on appeal.(s) If the dates of the latter only were given, the extract would appear equally good.

The extract is not issued under seal, but is authenticated by the signature of the Clerk of Court(t) on each page, and by a docquet at the end (also signed by him), in which the number of pages of the extract, and any alterations or marginal additions are mentioned.(u) The place and date of extracting are generally mentioned in the docquet, but it has been decided that (though advisable) they are unnecessary.(v) Era-

(q) *Stair*, 4, 1, 45, and 4, 42, 10; *Ersk.* 4, 2, 6; *Dickson on Evidence*, § 1258.

(r) *Hanna v. Neilson*, 2 March 1849, 11 D. 941.

(s) *Thomson v. M'Donnell*, 6 July 1841, 3 D. 1167; *Williamson v. M'Lachlan*, 19 July 1866, 4 Macph. 1091. If the decree have a date at the beginning and a date of signing, the latter is the date to be given; *Cleland v. Clark*, 15 Feb. 1849, 11 D. 601; 27 July 1850, 7 Bell's Ap. Ca. 158.

(t) *M'Dougal v. Archdattan*, 10 Jan. 1623, M. 12,180. In this case an extract signed by the judge was rejected.

(u) *Dickson on Evidence*, § 1254. It is essential that each sheet have at least one signature.

(v) *Williamson v. M'Lachlan*, *ut supra*; *Wilson v. Wilson*, 25 Nov. 1848, 11 D. 160. The opinion given in Mr Dickson's work on Evidence (§ 1252), that an extract of a decree not concluding with a warrant for execution in terms of the Personal Diligence Act requires to be authenticated in the old form prescribed by the A. S. 6 March 1829, does not seem well founded, because that form was superseded by the A. S. 27 Jan. 1830, in which the form is the same as in the Personal Diligence Act. The point, however, is of no importance, as it is not possible to conceive any circumstances in which the authentication of a decree which contains no authority for a warrant can be of much consequence.

Warrant embodied in Extract—Second Extract.

tures in an essential part of the extract would be fatal to it, and ought never to be permitted in any part, as a party doing diligence on such a document might subject himself in claims for damages.

5. Warrant embodied in Extract.—The warrant for execution, which was formerly a separate writ, is now embodied in the extract of the decree. Its form is contained in the Personal Diligence Act, and it authorises Messengers-at-Arms and Officers of Court to charge the debtor to make payment within a specified time under pain of poinding and imprisonment, and also to arrest the debtor's readiest goods and debts in satisfaction of the debt. It farther, in the event of the charge to pay not being obeyed, authorises the sale of the poinded effects.

In regard to this warrant care must be taken that the time given to the debtor to make payment be the proper period, and that if the amount of the debt contained in the decree be not such as to authorise the use of personal diligence, no authority be inserted to use the penalty of imprisonment. The time, called the days of charge, is fifteen days, unless there be any special authority for inserting a different period, and imprisonment (see article 17) is incompetent for a civil debt which does not exceed £8, 6s. 8d., exclusive of interest and expenses.

The warrant itself authorises only the remedies of poinding and arrestment. A further warrant has to be applied for if the creditor wants to enforce the penalty of imprisonment; and, in like manner, if he wants payment out of arrested funds, he has a further application to make to the Court.

6. Second Extract.—A party may have as many extracts of the decree as he chooses to pay for; and in this way, when a first extract has been lost or has defects, he can always have a remedy. This is the only way of getting over a faulty extract in the Sheriff-Court, for there is no power of amending extracts, such as the Court of Session can exercise.(w)

(w) See *Edington v. Astley*, 5 Dec. 1829, 8 S. 192; Dickson on Evidence, § 1260.

 Execution.

7. Expense of Extract.—The expense of the extract had formerly to be dealt with as a separate matter, but decree for expenses in general terms is now held to include the expense of extract, and the Clerk adds them without further authority from the Court.(x)

 EXECUTION.

8. Different kinds of Execution.—The nature of the execution varies according to what is desired to be taken in payment; and that may be either the debtor's person or his property. This property, again, may be either real or personal; and the personal property, again, may consist either of moveable goods in the debtor's hands, or of goods or debts due to him by others. The mode of attaching real property in payment of a moveable debt was by an apprising, but since 1672 this diligence has been incompetent, and adjudications in the Court of Session have been substituted.(y) All other kinds of execution are competent in the Sheriff-Court. The debtor's person may be imprisoned; his goods may be poinded and sold; and by the diligence called arrestment and furthcoming the goods or money due to him may be secured to his creditors. To diligence against the debtor's person and against goods in his hands a charge is a necessary preliminary, and it will therefore be noticed first; and then the three kinds of execution competent will be taken in their order. There is no rule, however, in Scotland requiring a creditor to do diligence in a particular sequence. He may begin with what diligence he pleases, and he may use all of them at the same time if he is so inclined.

9. By whom Execution carried out.—The execution is carried out by a messenger-at-arms,(z) or by a sheriff-officer, selected and employed by the creditor or his agent. The sheriff-officer

(x) 16 and 17 Vict. c. 80, § 14 (App. lxxvii).

(y) 1672, c. 19. In certain cases of debts *already heritable* there is a kind of execution competent in the Sheriff-Courts

called *poinding of the ground*, which will be noticed in Part III, Chap. II.

(z) 1 and 2 Vict. c. 114, sch. No. 6 (App. xviii.)

Execution beyond the County—The Charge—At whose Instance.

can act only within the jurisdiction for which his commission is granted. Should the officer so neglect or contravene his duty in the matter as to defeat the effect of the diligence, he and his cautioner will become liable for the debt.(a)

10. *Execution beyond the County.*—The warrant attached to the extract is available only within the jurisdiction of the court from which it was issued. If it be desired to charge, imprison, poind, or arrest, within the territory of another Sheriff, the extract must first be indorsed, either by the Clerk of the Bill-Chamber of the Court of Session, or by the Clerk of the Sheriff within whose jurisdiction the debtor, or his moveables, or the arrestee may be.(b)

CHARGE.

11. *The Charge.*—The charge is the technical name for the formal requisition to pay, which, after the judgment has been extracted, is embodied in the proper document and given to the debtor at the instance of the creditor. It is given by the messenger-at-arms or officer of court, and is in the shape of a command, in the name of the Sovereign and of the Sheriff of the county, or of the latter alone, ordering the debtor to pay the debt, interest, and expenses set forth in the judgment.

12. *At whose Instance.*—The charge is given at the instance of the creditor named in the decree, but if he have assigned his interest, his assignee can get authority to charge. The assignee must indorse on the extract a minute (signed by himself or his agent) craving authority to charge, arrest, and do other diligence at his own instance. This he must present to the clerk of the court from which the extract was issued, along with the evidence of the mode in which he acquired right to the extract; and the clerk, if there be no lawful cause to the contrary, must

(a) *Gilchrist v. Sutherland*, 19 July 1776, *M. voss* "Messenger," App. 1; *Chatto v. Marshall*, 17 Jan. 1811, F.C. (b) 1 and 2 Vict. c. 114, §§ 18 and 19 (App. xi).

Charge.

give the requisite authority, by writing after the minute the words "*Fiat ut petitur*," and dating and subscribing them. He also marks the date on the evidence produced, and initials it.(c) If the right to the extract have been conveyed in any other way than by an ordinary assignation—for example, by confirmation, to the executors; by marriage, to the husband; or by bankruptcy, to the trustee—the mode of getting authority to do diligence is the same.

A person not resident in Scotland does not require to conjoin a mandatory with himself in doing diligence, though if the diligence be suspended, he would require to sist a mandatory in the suspension.(d)

18. Requirements of the Charge.—The principal requirement of the charge is, that it be exactly in conformity with the extract-decree under which it is given.(e) This decree must be correctly referred to by the names of the pursuers and defenders, and its date.(g) The date on which the extract was issued need not be given, though it generally is.(h)

The document charges the debtor (designing him by name) to pay to the creditor (also designing him by name) the sums contained in the decree.

If anything have been paid to account care must be taken to give credit for it.(i)

The time allowed for payment is that specified in the warrant to the extract, and, in order that it may appear when this time will expire, the date of the charge is essential.(g)

The penalties are also those in the extract, subject to this limitation, that the penalty of imprisonment must not be recited if payments to account have reduced the debt below the amount (£8, 6s. 8d.) for which imprisonment is competent.(k)

(c) 1 and 2 Vict. c. 114, § 12 (App. ix).

(d) *Ross v. Shaw*, 8 March 1849, 11 D. 984; *Chambers v. Chambers*, 8 June 1839, 1 D. 911.

(e) *Craig v. Brock*, 23 Nov. 1841, 4 D. 54; *Watts v. Barbour*, 1 July 1828, 6 S. 1048.

(g) *Beattie v. M'Lellan*, 28 May 1844, 6 D. 1088.

(h) See *supra*, art. 4.

(i) See *M'Martin v. Forbes*, 12 Nov. 1824, 3 S. 275.

(k) 5 and 6 Will. IV, c. 70.

 Service of the Charge—Execution of the Charge, &c.

The charge is written, or partly written and partly printed, and is authenticated by the signature of the officer.(l)

14. *Service of the Charge.*—The charge may be served by the officer as soon as the extract is issued. It is served on the debtor or debtors mentioned in the decree, the only exception being that, in the case of a company debt, the individual partners may be charged, although the names of none of them have been contained in the decree.(n) The place and mode of service, and the regulations as to the presence of a witness, are exactly the same as in the case of a service of the summons.(o)

15. *Execution of the Charge.*—After serving the charge, the officer fills up a certificate of his having done so, which is called the Execution of the Charge. The form for this document is given in the Personal Diligence Act. It is signed by the officer and the witness.(p)

The execution of the charge is an echo of its words, with the addition of describing the time and mode of the service;(q) and, as it is the foundation for going on to the use of farther diligence, as much care must be taken with it as with the charge itself.

16. *Registration of the Execution.*—The execution may be registered in the court from which the extract issued. This may be done at any time at which the holder of the decree may apply, not later than a year and a day from the expiry of the charge. Its effect is to accumulate the debt and past interest into a capital sum, whereon interest shall thereafter become due; and it is also a necessary preliminary to the use of diligence against the person.(r)

(l) 1 and 2 Vict. c. 114.

(n) *Knox v. Martin*, 23 Jan. 1847, 10 D. 50. A creditor charging in this way a person who is not a partner is liable in damages.

(o) 1540, c. 75, *ante*, Chap. II, Sec. 11.

(p) 1681, c. 5; 1 and 2 Vict. c. 114, § 32.

(q) 1540, c. 75; *Nisbet*, 80 July 1786; Elchies, *voce* "Execution," No. 2.

(r) 1 and 2 Vict. c. 114, §§ 10 and 11 (*App. viii*).

Imprisonment.

IMPRISONMENT.

17. When Imprisonment competent.—Imprisonment was formerly competent for all debts, however small in amount, but since 1835 imprisonment has not been competent for civil debts which do not exceed the sum of £8, 6s. 8d. exclusive of interest and expenses.(s) This limit affects civil debts only, and is not applicable to taxes or penalties due to the revenue, to poor-rates, or other local taxes, or to fines or forfeitures imposed by law,(t) or to imprisonment for sums decerned for aliment.(u)

Certain persons are exempt from imprisonment for civil debt. Peers are exempt; and during the sitting of Parliament, and for forty days before and after, members of the House of Commons are also exempt.(v) Married women are exempt during coverture,(x) and pupils are exempt under a special statute.(y) Persons having personal protections obtained under the Bankruptcy Act or in the process of *cessio*, are also exempt.

The privilege of the sanctuary still belongs to the precincts of Holyrood Abbey, and debtors who have been booked in the abbey books are exempt from imprisonment while they remain there.(z)

18. Warrant of Imprisonment.—The execution of charge must be registered in the Court of the Sheriff from which the extract was issued, within year and day after the expiry of the charge.(a) The clerk who registers it enters the name and designation of the person by whom the extract and execution were presented, and the date of presentation. After registering, the Sheriff-clerk writes on the extract (and upon the execution, if it be separate) a certificate of registration, which he dates and subscribes.(b)

(s) 5 and 6 Will. IV. c. 70.

(t) *Lawson v. Jopp*, 16 Feb. 1853, 15 D. 392 (penalty under Salmon Fisheries Act).

(u) *Infra* as to Actions of Aliment (Part III, Chap. II).

(v) 2 Bell's Com., 5th ed., p. 569.

(x) Bell's Principles, 4th ed., § 1612.

(y) 1696, c. 41.

(z) 2 Bell's Com., 570.

(a) 1 and 2 Vict. c. 114, § 10.

(b) *Ib.* § 11.

Apprehending the Debtor.

When warrant to imprison is desired, the creditor or a Procurator of Court must indorse and subscribe on the registered extract a minute asking for a warrant to search for, take, and apprehend the person of the debtor; and, on his being apprehended, to imprison him till he fulfil the charge; and, if necessary for that purpose, to open shut and lock-fast places. If the warrant is desired by an assignee, authority must be got in the same way as if a charge were to be given by an assignee.(c) The form of minute for craving warrant of imprisonment is given in the Personal Diligence Act,(d) and requires to be carefully followed. It is enough, however, that the minute be signed by the creditor or his procurator, though it be written by another.(e) The statutory form requires the place and date of the minute to be given. It was not held to be an objection that this date showed the minute to have been written before the execution was registered, as it had not been used till after.(e) But if the place and date be omitted, the minute will be invalid.(g)

On the minute being presented the Sheriff-clerk (if there be no lawful cause to the contrary) writes on the extract the deliverance "*Fiat ut petitur*," which he dates and subscribes. Under this authority it is now lawful to take all the steps for which the minute asked authority, and all magistrates and keepers of prisons are bound to receive and detain the debtor till liberated in due course of law.(h)

19. Apprehending the Debtor.—The officer, duly instructed by the creditor, and armed with the warrant, is now bound to search for and take the person of the debtor. The apprehension is completed by the officer taking him and telling him that he is his prisoner. The exhibition of the "blazon," or of

(c) *Supra*, art. 12.

(d) Schedule 8 (App. viii).

(e) *Allan v. Millar*, 24 June 1848, 10 D. 1411.

(g) *Jameson v. Wilson*, 17 Feb. 1853, 15 D. 414.

(h) 1 and 2 Vict. c. 114, § 11. The Magistrates are now represented by the County Prison Boards under the Prisons Administration Acts.

Imprisonment.

the "wand of peace," are not required on apprehension: only in the event of resistance is it proper to show them, in order the more effectually to make the parties resisting incur the penalties of deforcement.(*i*)

Like all other acts of civil diligence apprehension cannot take place on Sunday, and it farther appears that it is not lawful on general fasts proclaimed by Government. It would appear that the rule does not apply to parochial fasts.(*k*)

On the prisoner being apprehended it is the duty of the officer to take him to the nearest prison, unless the prisoner be so unwell that he cannot safely be moved, or unless the prisoner, as frequently happens, agrees to some other course, in order to have an opportunity of settling the debt.(*l*)

20. Imprisonment of the Debtor.—The officer, on taking the prisoner to the jail, must leave with the jailor the warrant under which the apprehension was made, as the debtor is entitled to require exhibition at any time of the authority on which he is detained.(*n*) The officer then enters the debtor in the books of the prison, stating the amount of the debt due. If anything have been paid to account a note of that should be indorsed on the warrant, and the actual balance due entered.(*o*) Lastly, the officer deposits ten shillings on behalf of the creditor to meet any claim for aliment while in prison which the debtor may make.(*p*)

21. Alimienting the Debtor in Prison.—The public authorities are not bound to support in prison debtors imprisoned for civil debts. If the debtor cannot maintain himself, the creditor is obliged to do it; and there is a summary mode of enforcing

(*i*) *Scott v. North of Scotland Bank*, 18 Jan. 1855, 17 D. 292.

(*k*) 2 Bell's Com., 5th ed., 569.

(*l*) *Garden v. M'Coll*, 13 Dec. 1826, 5 S. 128.

(*n*) 2 Bell's Com., 5th ed., 544. Pro-

fessor Menzies (Lectures, 3d ed., p. 800) says it is enough to leave a certified copy of the warrant.

(*o*) *Garden v. M'Coll*, *ut supra*.

(*p*) 6 Geo. IV, c. 62.

Liberation of the Debtor.

this obligation.(q) The debtor applies by petition to the Sheriff,(r) who thereupon fixes a time for examining the debtor on oath, and appoints intimation of this to be given to the incarcerating creditor, or his agent.(s) At the time fixed the debtor is examined on oath regarding his ability to aliment himself in prison; and the examination should be limited to this and not be permitted to extend, like a bankruptcy examination, to the debtor's whole affairs.(t) On the question, whether the debtor has means of subsistence, his oath is conclusive in the first instance, though the creditor may adduce evidence to contradict it.(u) In general, however, this is not worth the creditor's while, as the debtor, getting aliment, is bound on demand to execute a disposition *omnium bonorum* for behoof of his creditors, and under this the creditor may take any property of which he has knowledge.(v) This disposition requires no stamp.(x) When aliment is awarded, the creditor must within ten days lodge money to meet any aliment then past due, and future aliment.(y)

22. Liberation of the Debtor.—The debtor may be liberated on payment of the debt, or, if there be no one authorised to receive payment, on consigning the amount with a magistrate,(z)

(q) See Act of Grace and Amending Acts, printed in Appendix, part ii, p. xcix.

(r) The application used to be made to the burgh magistrates, and it is still competent to them. 7 and 8 Vict. c. 34, § 13 (App. cii).

(s) *M'Kenzie v. M'Lean*, 14 Jan. 1830, 8 S. 306. If there be more than one incarcerating creditor, intimation to the one from whom aliment is asked is enough; *Anderson v. Dingwall Magistrates*, 15 Jan. 1823, 2 S. 116.

(t) A. S. 12 Nov. 1825, Part II, c. 4 (App. cii). This Act of Sederunt was passed for the guidance of the burgh magistrates, and is the only instruction on the point.

(u) A. S. *ut supra*. In *Minorgan v. Hogg*, 9 June 1824, 3 S. 116 (decided before the A.S.), the Court had held that the creditor could not bring evidence to rebut the oath.

(v) 6 Geo. IV, c. 62, § 7 (App. ci).

(x) 55 Geo. III, c. 184, sch. ii, § 5; *Rae v. Henderson*, 23 Feb. 1837, 15 S. 653.

(y) *M'Iver v. Linkithgow Magistrates*, 29 Nov. 1832, 11 S. 144. In counting the aliment due the day of imprisonment is not counted; *Gibb v. Hamilton Magistrates*, 18 Nov. 1833, 12 S. 28.

(z) *Forbes v. Alison*, 31 Jan. 1823, 2 S. 169.

 POUNDING AND SALE.

or on the written consent of the incarcerating creditor,(a) or (where aliment has been allowed, as explained in the preceding article) on the creditor failing to aliment the debtor in prison.(b) He may also be liberated by the order of a Court, pronounced in a competent process.

23. Re-imprisonment of Debtor.—When the debtor has been liberated for any cause less than the payment of the debt or an order of protection, he can be re-imprisoned on the same diligence.(c) Should this power, however, be used oppressively, the Court of Session may interfere.(d)

 POUNDING AND SALE.

24. Nature of Pounding.—Pounding is the means by which the goods of a debtor who has been charged to pay, and has failed to do so, are made available for payment of the debt. Formerly the goods themselves were adjudged to the creditor.(e) A value was placed on them, at which they were indeed tendered back to the debtor; but, as a person who had not money to pay his debts seldom had money to buy back his goods, the result generally was that the goods went to the creditor at the appraised value in payment of his debt. Under the modern practice, if the debtor cannot take back the goods at the appraised value, they are offered for sale by public auction, and are not handed bodily to the creditor unless there be no one at the sale willing to give the appraised value for them.(g)

(a) Where there were two creditors in the warrant, the Court in one case held that the consent of both was required for liberation, but the case was peculiar, and it would depend on how the debt was payable; *Campbell v. Mullen*, 15 Nov. 1850, 18 D. 78.

(b) 1696, c. 82 (App. xcix). If the aliment be not lodged on the tenth day from intimation, the debtor is liberated; *Hood v. Mackirdy*, 14 Dec. 1813, F.C. But where a third of a day's aliment is

left it is premature to liberate in the morning; *White v. Robertson*, 24 Nov. 1858, 21 D. 28.

(c) *Pender v. M'Arthur*, 28 Jan. 1846, 8 D. 408.

(d) See *Crawford v. Dawson*, 11 March 1836, 14 S. 688.

(e) See former practice, explained in Erskine, 3, 2, 20.

(g) Personal Diligence Act, 1 and 2 Vict. c. 114. (App. iv.)

What may be Pounded.

25. What may be Pounded.—All the goods of the debtor found in his own possession, or in the possession of his servants, or others who hold solely as custodiers for his behoof, or in public places, may be pounded. It is, however, only *goods* that can be pounded. Pounding is not the diligence for attaching debts due to the debtor; and within this category it seems that bills and bank-notes, and even coin, must be counted.^(h) It seems indeed to be clear (from the whole procedure which is followed) that pounding cannot be the diligence to reach such things, and as negotiable debts have been exempted from arrestment, the remarkable result is reached that it is hardly possible to attach them at all.⁽ⁱ⁾ If the debtor will not part with them, it seems that he must either be sequestered under the Bankruptcy Acts, or imprisoned till he give them up; and as both of those proceedings are incompetent where the debt due by the debtor is of small amount, there is here evidently a defect in the law.

There are certain exceptions in regard to the goods that may be pounded. Thus ships, for some reason, are attached by arrestment.^(k) Plough goods, that is, implements for tilling the ground and the horses or oxen used for drawing them, cannot be pounded during the season for tillage, unless other goods cannot be found.^(l) Goods in which the debtor has only a joint interest,^(m) or a temporary interest, such as a liferent,⁽ⁿ⁾ cannot be pounded; but to prevent fraudulent claims of this kind, goods found in the debtor's possession are presumed to be his, until the contrary is proved. Goods subject to a hypothec cannot be pounded where the person having the right of hypo-

(h) See *Alexander v. M'LAY*, 10 Feb. 1826, 4 S. 439, where the point as to the competency of pounding negotiable documents was raised. In the Exchequer Act (19 and 20 Vict. c. 56, § 82) there is special power to pound for Crown debts "the whole moveable effects, without exception, including bank-notes, money, bonds, bills, crop, stocking, and implements of husbandry of all kinds."

(i) See *infra*, art. 37.

(k) See Arrestment and Sale of Ships, *infra*, art. 43.

(l) 1508, c. 98, Erakine, 8, 6, 22; *Lord Advocate v. Forgan*, 20 Feb. 1811, F.C. (App. No. 1).

(m) *Fleming v. Twaddle*, 2 Dec. 1828, 7 S. 92.

(n) *Scott v. Price*, 13 May 1837, 15 S. 916.

 Poinding and Sale.

the objects, unless security be given for the whole of the debt secured by the hypothec.(o) Where the period for payment of this debt is past, sufficient security will be given if effects enough be left to meet it.(p) If the poiding creditor pays or finds security for the secured debt he is entitled to an assignation of the right of hypothec.(q) but it is illegal for him to poid (as has been done) greatly more than his own debt, in order to pay out of the proceeds both it and the secured debt.(r)

It is sometimes difficult to tell whether an article is moveable or not. Thus, it is held that growing corn is moveable if it be nearly ripe;(s) but that it is not moveable if it has only briered.(t) Grass and green crops, which a tenant is bound to consume on the land, probably could not be poided.

26. Time of Poiding.—The full days of the charge must have expired before the poiding can be executed. How long the creditor may delay after the charge is not settled; but poidings have been sustained which were not executed for three or four years after the charge was given.(u) The limit of a year and a day, applicable to the case of execution against the person, is not applicable to poidings.

A poiding must be in the day time. At latest, it must be begun before sunset, and executed during daylight.(v)

27. How Poiding Executed.—The poiding is executed at the place where the goods are found; and if the officer cannot get access to them he may open shut and lockfast places in all cases in which the extract-decree authorises him to do so.

(o) *Pringle v. Scot*, 30 June 1736, M. 6216.

(p) *Hay v. Keith*, 25 July 1623, M. 6788.

(q) *Crauford v. Stewart*, 21 Jan. 1737, M. 10,581.

(r) *M'Kinnon v. Hamilton*, 21 June 1866, 4 Macph. 852; *Hamilton v. Emslie*, 27 Nov. 1868.

(s) *Ballantine v. Watson*, 15 June 1709, M. 10,526.

(t) *Elder v. Allen*, 5 July 1833, 11 S. 902.

(u) *Kerr v. Barbour*, 30 May 1837, 15 S. 1041.

(v) *Douglas v. Jackson*, 11 Feb. 1695, M. 8739.

How Poining Executed.

This authority is contained in all extracts of ordinary Sheriff-Court decrees. At the debtor's dwelling or premises the officer reads his warrant and asks payment of the debt.(w) If any one offers payment, either then or at any stage before the poining is complete, the poining must be stopped, and if the officer has not special authority to receive the money, it must be taken to the creditor, or consigned in some bank. The officer has not authority to receive the money without special instructions; and if he were to receive and lose it, the debtor might have it to pay over again. What has to be tendered is merely the sum or sums contained in the extract-decree, not the expense of charging and attending to point. When the latter are not tendered, the creditor must bring another action for them. The person paying is not entitled to have delivery of the extract, but he is entitled to see such a marking made on it as will prevent its being used for farther diligence.(x)

Where no tender is made, the officer proceeds to inventory the goods, and have them valued. This is done by two valuers, whom he appoints by administering an oath to the due performance of their duty. The valuation must be specific, each article, or set of articles, being kept separate. A poining was once found bad because a trunk and its contents had been valued at a slump sum.(y) Goods are poined to the amount of the debts contained in the decree, and of the expenses of the diligence. The invariable practice is to include the latter, because if there is a sale those expenses can be taxed in due course, and there is nothing in this case to be gained by leaving over their settlement to a future action. The legality of the practice seems settled.(z)

At the conclusion of the poining, the goods are offered back at the appraised value. If any one then tender the value of the goods, the creditor must take it, even though the amount

(w) See the form of execution in ordinary use.

(x) *Inglis v. McIntyre*, 14 Feb. 1862, 24 D. 548.

(y) *M'Knight v. Green*, 27 Jan. 1835, 13 S. 342.

(z) *M'Neill v. M'Murchy*, 13 Feb. 1841, 3 D. 554.

 Poinding and Sale.

be less than his debt; if the goods be bought back they cannot be poided again for the same debt.(a)

If there be no payment, the officer then leaves a schedule of the poided goods in the possession of the debtor; and with him the goods also remain.(b) The officer usually warns the parties present of the consequences of meddling with any of the goods.

28. Person interrupting Poinding.—If any person claim any of the goods as his, the officer may examine him or his witnesses on oath; and if he be satisfied that the goods claimed are not the debtor's, he may discontinue the poiding. If the person claiming the goods produce a written title to them, it is said that the officer (though he may not be satisfied with it) must desist from the poiding, and make a special report on the point.(c) Any person interrupting the poiding by a claim of this kind is liable in damages if the claim be ill-founded;(d) and a person who interrupts a poiding by force is liable to punishment, and to make payment of the value of the goods.(e) The proper way to prevent an illegal poiding is for the debtor to apply for interdict. If any person is aggrieved by having his goods poided for the debts of another, he also can have his remedy at once in this way (by applying for interdict against the sale), and he will farther be entitled to payment of all damages he may have sustained.

29. Conjoining Creditors.—To prevent expense in unnecessary competitions between creditors, it is provided that, where an officer proceeds to poid at the instance of any creditor, he shall conjoin in the poiding any other creditor who shall exhibit and deliver to him a warrant to poid. The

(a) *Fiddes v. Fyfe*, 16 Feb. 1791, Bell's 8vo Cases, 355.

(b) 1 and 2 Vict. c. 114, § 24.

(c) *Menzies* (Lectures, 3d ed., p. 308) founding on *Breadalbane v. Sinclair*,

22 July 1867, M. 10,522, but the case cannot be taken as conclusive.

(d) *Arnot v. Dowie*, 20 Nov. 1863, 2 Macph. 119. No liability for the debt, as such, is incurred.

(e) *Erakine*, 3, 6, 27.

Reporting the Poinding—Custody of Goods between Poinding and Sale.

claim to be conjoined must be made before the first poinding is completed. When such a claim is made, the officer pouds enough to meet both debts. He causes the pouded effects to be valued as in the ordinary case, and one valuation is sufficient.(f) If the poinding has been completed before the second creditor has had the opportunity of being conjoined, he must (if he desires to share in the proceeds) take steps to have the debtor sequestrated or made notour bankrupt under the Bankruptcy Acts.(g)

30. Reporting the Poinding.—The officer must report an execution of the poinding to the Sheriff. This he must do within eight days, unless cause can be shown for requiring a longer period.(h) The execution must specify the diligence under which the poinding was executed, the amount of the debt, the names and designations of the debtor and of the poinding creditor, the effects pouded and their value, the names and designations of the valutors and of the person in whose hand the goods were left, and the fact of the delivery of the schedule to him. The execution is subscribed by the officer and the two valutors, who (it is provided) may be the witnesses to the poinding.

31. Custody of Goods between Poinding and Sale.—On the execution being reported to the Sheriff, it is competent for him to give such orders for the security of the moveables as he may find necessary. Under this power he may give orders for their removal from the custody of the debtor, if there is reason to fear that they will not be safe with him. In former times it was the practice to remove the goods at once in every case. If the articles are of a perishable nature, the Sheriff is empowered to provide for their immediate disposal, under such precautions as he may think fit.(i)

(f) 1 and 2 Vict. c. 114, § 23.

(g) 19 and 20 Vict. c. 79, §§ 7 and 12.

(h) 1 and 2 Vict. c. 114, § 25; *Miller v. Stewart*, 17 Feb. 1835, 13 S. 483.

(i) 1 and 2 Vict. c. 114, § 26.

 Pounding and Sale.

Any person carrying off the pointed goods is liable to be imprisoned until he restore them or pay double the appraised value. This power may be exercised on a summary complaint being made either to the Sheriff of the county where the effects were pointed, or to that of the domicile (residence) of the person who interfered with them.(k)

32. Fixing and Advertising the Sale.—When required, the Sheriff grants a warrant for the sale of the pointed effects. The requisition is usually made by the pointing officer when reporting the pointing. It is always granted, unless lawful cause be shown to the contrary. The warrant fixes what notice of the sale is to be given, and the time and place at which it is to be held. It also names a judge of the roup at whose sight the sale is to be carried out. The notice is left to the discretion of the Sheriff, and will vary greatly, according to the nature and value of the articles to be sold; but the Sheriff will naturally see that it is of something of the same character as would be given by a prudent person having a similar sale for his own behoof. The time of the sale must not be sooner than eight days, nor later than twenty days after the notice.(l) As an unsuitable hour might have as bad an effect on the sale as an unsuitable day, the hour as well as the day should be fixed in the warrant.(n) The place of sale has also to be fixed by the Sheriff;(o) and it is in his discretion to fix this so as to suit all parties in the best way possible. These things the Sheriff must himself fix, and he must not grant a general warrant to sell within a specified period, leaving the notice or the time or place to be filled in by the officer.(p) The Sheriff orders a copy of the warrant of sale to be served on the debtor and on the person who has possession of the pointed effects, if he be

(k) 1 and 2 Vict. c. 114, § 80.

(l) A sale advertised on the 10th is competently carried out on the 18th; *M'Neill v. M'Murphy, supra*.

(n) See the point raised in *M'Kinnon*

v. Hamilton, 21 June 1866, 4 Macph. 852.

(o) *M'Vicar v. Kerr*, 2 July 1857, 19 D. 948.

(p) *Kewly v. Andrew*, 8 March 1843, 5 D. 860.

 Conduct of the Sale—Report of Sale.

different from the debtor, at least six days before the date of the sale.(q)

33. Conduct of the Sale.—At the sale the goods are offered at upset prices not less than the appraised values. If the appraised value be offered, they must be sold, and the poulder or any other creditor is at liberty to buy.(r) If no offerer appears, the effects, or such part as may be necessary according to the appraised value to satisfy the debt, interest and expenses, due to the poulding creditor or creditors, is delivered over to them or their authorised agent. The Act declares that, notwithstanding this delivery, the goods shall remain subject to the claims of other creditors to be ranked as by law competent;(s) but as the goods, when thus delivered, pass from the custody of the Court, the right to such ranking, where the bankruptcy laws give it, will have to be made good in separate proceedings.

34. Report of Sale.—Within eight days after the day of sale the judge of the roup must report to the Sheriff what has taken place.(t) If the goods have been delivered, he reports that fact; but if the goods, or any of them, have been sold, he lodges (also within eight days) the roup rolls, or certified copies of them, and an account setting forth the sum arising from the sale and the expenses which attended it. The sum the Sheriff may order to be lodged in the hands of the Sheriff-clerk if he see cause; and this power is useful where other creditors have made claims to be ranked along with the poulding creditors, because while the money remains in the hands of the Court the Sheriff may decide between the competitors, and apportion the money amongst them according to their several rights, without putting them to the expense of new proceedings.(u) If the Sheriff do not see cause to order consignment, or if after con-

(q) 1 and 2 Vict. c. 114, § 26.

(r) 1 and 2 Vict. c. 114, § 29.

(s) 1 and 2 Vict. c. 114, § 27.

(t) 1 and 2 Vict. c. 114, § 28; *Miller v. Stewart*, 17 Feb. 1835, 13 S. 483.

(u) In competitions of this kind the proceedings are the same as in multiple-poidings.

 Arrestment and Furthcoming.

signation is made no cause be shown to the contrary, the Sheriff orders payment of the sum to the poinding creditor or creditors, or of so much of it as is necessary to meet his or their debts and expenses. The creditors receiving the money take it subject to the right of other creditors to share with them under the Bankruptcy Acts;(v) but that right, after the money is paid over, will have to be made good under new proceedings.

35. Register of Poindings.—The Sheriff-clerk keeps a register of all poindings, and is bound to show the report of any poinding, with the relative documents, to all concerned on payment of a fee of one shilling.(x)

 ARRESTMENT AND FURTHCOMING.

36. Arrestment in Execution.—Arrestment in execution is a diligence similar to arrestment in security, and, when completed by decree in the action of furthcoming, to which it is preliminary, has the same effect as the diligence of poinding in transferring the property of the debtor to the creditor.(y) But until thus completed by this decree, the transfer is imperfect, and the diligence is liable to be defeated. In competitions between arrestments, none of which have been followed by decree of furthcoming, they rank with each other according to their date, but when in this incomplete state they cannot compete with a poinding,(z) or a sequestration under the bankruptcy statutes, or with a confirmation as executor-creditor,(a) or with any other transfer complete in itself.

37. What may be Arrested.—The general principle, in regard to what may be arrested, is, that all debts or goods owing to the debtor may be arrested in the hands of the persons who are to pay or supply them to him.

 (v) 1 and 2 Vict. c. 114, § 28.

(z) 2 Bell's Com., 5th ed., 64.

(x) *Ibid.*(a) *Wilson v. Fleming*, 26 June 1823,(y) *Muirhead v. Cowie*, 17 Feb. 1735, 2 S. 430.

M. 687.

What may be Arrested.

With regard to debts due to the debtor, there is seldom much difficulty in understanding when they may be arrested, as almost any kind of debt, not being heritable,^(b) which is due to him is arrestable. Thus, the price of goods sold may be arrested in the hands of the buyer;^(c) money lodged in bank may be arrested in the hands of the bank; or the debtor's share of a company's stock may be arrested in the hands of the company.^(d) But there are certain debts which cannot be arrested. Thus, money which has been consigned and set apart for a certain purpose cannot be arrested so as to defeat that purpose.^(e) Alimentary funds are in like manner exempt from arrestment;^(g) and under this exemption are included wages of all kinds, in so far as they are necessary for the aliment of the servant or workman.^(h) In order not to interfere with their use as currency, debts due by bill of exchange have been exempted from arrestment.⁽ⁱ⁾

With regard to goods to which the debtor has right, there is often great difficulty in saying when they are liable to arrestment, and when they should be attached by poinding. If the arrestee possess them simply for the debtor, and have no right of any kind to retain them as against him, arrestment is not the proper diligence.^(k) But if the arrestee have them in such a capacity as to give him a right of retention, it seems

(b) Although heritable debts recorded in the Register of Sasines are now moveable *quoad* succession (31 and 32 Vict. c. 101, § 117), they are still heritable on this point. Heritable debts not recorded may be arrested; 1661, c. 51; *Stewart v. Dundas*, 20 Feb. 1706, M. 705. The interest of an heritable debt is arrestable.

(c) *Creditors of Bonjedward*, 24 Nov. 1753, M. 743.

(d) *Sinclair v. Staples*, 27 Jan. 1860, 22 D. 600. In the incorporating acts and charters of some companies there are special provisions against the arrestment of stock.

(e) *Ante*, p. 183, art. 10 (Consignment).

(g) *Smith v. Bell*, 29 May 1855, 17 D. 778.

(h) 1 and 2 Vict., c. 41, § 7 (App. cxlv).

(i) *Dick v. Goodall*, 1 June 1815, F.C. It is said that the creditor wanting to attach the contents of a bill held by his debtor should raise an action of exhibition, or a sequestration of the bill, against his debtor, so as to prevent him negotiating it. See the last edition of Thomson on Bills, p. 194. The use of an interdict to aid an arrestment was held objectionable in *M'Gubbin v. Venning*, 3 Dec. 1859, 22 D. 164, but the circumstances were peculiar.

(k) *Erskine*, 3, 6, 5.

 Arrestment and Furthcoming.

that in general they may be arrested in his hands. Thus, while an arrestment in the hands of a clerk of goods belonging to his employer is bad; ^(l) an arrestment of goods in the hands of a carrier or of a manufacturer seems to be good. ⁽ⁿ⁾ But this principle is not strictly carried out; and where the custody is of a short or temporary character, there is no power of arrestment in the hands of the custodier. Thus, a parcel could not be arrested in the hands of a street porter, and a horse cannot be arrested in the hands of a smith who is shoeing it, ^(o) or in the hands of an innkeeper in whose house the owner is staying; ^(p) although each of these parties has a certain right of retention. Where there is no right of retention at all, there can be no arrestment: for instance, where a tenant hires a furnished house, the furniture cannot be arrested in his hands. ^(q) Where there is a clear right of retention, on the other hand, there is a clear right to arrest: for instance, in the case of goods sold but not delivered, creditors of the purchaser may arrest them in the seller's hands. ^(r)

Where the custodier of the goods is not bound to give up the goods themselves to the debtor, but has got them for the purpose of selling them and accounting to him for their proceeds, they may be arrested in his hands. As he then has the power of disposing of them, the goods are, properly speaking, in his hands, and out of the hands of the debtor. Thus, when a debtor went abroad leaving behind the furniture in his house, with instructions to an agent to sell it, an arrestment used in the agent's hands was held good. ^(s)

(l) *Burns v. Bruce*, 27 Feb. 1799, Hume 29; and see a similar case, *Cunningham v. Home*, 18 Nov. 1760, M. 747.

(n) *Matthew v. Fawns*, 21 May 1842, 4 D. 1242, 2 Bell's Com., 5th ed., 73.

(o) *Neilson v. Smith*, 20 Feb. 1821, Hume 81.

(p) *Hume v. Baillie*, 29 May 1852, 14 D. 821.

(q) *Davidson v. Murray* 11 Dec. 1784. M. 761.

(r) See 19 and 20 Vict. c. 60, § 3. The seller, to put himself on a par with other creditors, may also arrest; and this is the only case in which a party can arrest goods in his own possession.

(s) *Brown v. Blaikie*, 26 Nov. 1850, 13 D. 149; and (to similar effect) *Macfarlane v. Forrester*, 20 Nov. 1823, 2 S. 505; and see also *Todd v. Smith*, 16 July 1851, 13 D. 1371.

On whom Arrestment served.

38. On whom Arrestment served.—The arrestment must be served on the debtor to the arrester's debtor.(t) The arrestee must be indebted directly to the debtor, and not to some intermediate party. Where the debtor has a claim against some person, who again has a claim against some second person (say some trustee), arrestment in the hands of this second person is invalid.(u) This does not mean that the arrestee must always be the person who incurred the debt due to the debtor; it is enough that he be such a person as the debtor could have maintained an action against for his debt. For example, the arrestee may be the trustee under the bankruptcy statute,(v) or a general factor and commissioner,(x) or the executor,(y) or other legal administrator, of the person indebted to the debtor.

The arrestee must farther be indebted to the debtor at the actual time when the arrestment is used; and the arrestment will not affect any debt or property for which his liability commences at some subsequent time. Thus, if goods be consigned to a person, an arrestment laid on before their actual arrival is bad; because, until the arrival, the consignee is under no obligation to account for them.(z) In like manner, though an arrestee be in process of making up a title (such as that of executor), in which capacity the debtor would have a claim against him, yet, if the title be incomplete at the date when the arrestment is used, the arrestment is ineffectual.(a) On this prin-

(t) The arrester's debtor, or the debtor in the decree, is usually called in the books the "common debtor," because in a competition between arresting creditors he is indebted in common to all of them. But the name is unnecessary and confusing when speaking of cases where there is no competition. It would be a great convenience if, instead of always having to repeat "debts due to the debtor," some such words as "credits" were in use.

(u) *Campbell v. Faikney*, 12 Dec. 1752, M. 742.

(v) *Grierson v. Ramsay*, 25 Feb. 1780, M. 759.

(x) *Erskine* 3, 6, 4; 2 Bell's Com., 5th ed., 74.

(y) *Globe Insurance Co. v. Mackenzie*, 14 Aug. 1850, 7 Bell's Ap. Ca. 296.

(z) *Stalker v. Aiton*, 9 Feb. 1759, M. 745.

(a) *Atkinson v. Learmonth*, 14 Feb. 1808; M. voce "Service and Confirmation," App. No. 3.

 Arrestment and Furthcoming.

ciple, an arrestment of rents or interests covers only arrears, and the rent or interest for the current term.(b)

The persons in whose hands the arrestments are used must be carefully designed. An arrestment used in the hands of "Sibbalds Brothers," where the name of the company was "Sibbalds Brothers & Co.," was held bad.(c)

39. How Arrestment Used.—Giving a charge to the debtor is not necessary prior to arrestment.(d) The arrestee is served with a schedule which narrates the extract-decree under which the arrestment is used. The schedule then arrests (in the form in which it is commonly used) a specified sum (not exceeding the debt) and all goods, gear and effects belonging to the debtor, which are in the hands of the arrestee. Sometimes also the schedule specifies the particular debt which the arrestee is due to the debtor, or the particular article belonging to the debtor which the arrestee has in his hands; and this is a prudent course to take where there is any suspicion that the arrestee may be not unwilling to misunderstand the arrestment. The arrestment is served in the same way as the citation of a summons, and a similar execution is made out.

40. Effect of Arrestment.—The effect of arrestment is to

(b) *Livingston v. Kinloch*, 10 March 1795, M. 769; *Smith v. Burns*, 23 June 1847, 9 D. 1844; *Wright v. Cunningham*, 23 June 1802, M. 15,919.

(c) *Henderson's Trustees v. Lang*, 20 May 1831, 9 S. 618. It is difficult, looking at arrestment in execution as a means of recovering debts that are due, to understand why so many confusing distinctions have been introduced, but they have arisen from the diligence having been so often used to obtain inequitable preferences by one creditor over another. The whole law stands greatly in need of revision. It is not right that a creditor seeing goods belonging to his debtor should be liable to have his right

to them defeated, and himself perhaps found liable in damages, because the law leaves him in uncertainty as to the technical mode of attaching them. This is all the more unjust, because the uncertainty often arises from the necessary want of knowledge of the relations subsisting between the debtor and the person in whose hands the property is seen. The length of time which a person who has used arrestments in execution may delay in following them up, is preposterous, and permits an almost fraudulent appearance of having credit to be kept up long after the reality is gone.

(d) *Weir v. Falconer*, 2 Feb. 1814, F.C.

 Prescription of Arrestment—Action of Furthcoming.

make an arrestee paying to the debtor in defiance of it liable in second payment to the arrester; and liable also, it may be, in an arbitrary fine for disregarding proceedings taken under the authority of a court. In the same way as in the case of arrestment in security, the arrestee is not liable in repayment, or (still less) in the penalty, if he have paid the debt while excusably ignorant of the arrestment having been used.^(e) If the arrestee die, the arrestment should be used over again against his representatives, as they are held not to be bound to know of it, though the arrestment is still good for the purposes of competition.^(f)

41. Prescription of Arrestment.—An arrestment in execution (like an arrestment in security) prescribes in three years from its date; and unless the usual action of furthcoming or some other action, such as a multiplepoinding, be brought before the expiry of this period to have the debt or goods adjudged to the arrester, the arrestment falls.^(g)

42. Action of Furthcoming.—The action of furthcoming is brought at the instance of the creditor, and calls the arrestee and the debtor as defenders. The action concludes for payment to the creditor of the debt due from the arrestee to the debtor, or of so much of it as will pay the creditor's debt and the expenses of the arrestment. If goods have been arrested, the summons may conclude for a warrant to sell them and to apply their proceeds in like manner. It is one of the anomalies of the law of arrestments that the expenses of a furthcoming cannot be made good out of the arrested effects.^(h)

In defence, the arrestee is limited to pleading defences against the validity of the arrestment. He cannot dispute the

(e) *Ante*, p. 181, art. 7.

(f) *Aberdeen v. Scot's Creditors*, 22 Dec. 1738, M. 774 and 775.

(g) 1 and 2 Vict. c. 114, § 22.

(h) *May v. Malcolm*, 7 June 1825, 4 S. 76. The case was one of arrestment in security, but the principle (whatever it may be) seems equally applicable to arrestment in execution.

 Arrestment and Furthcoming.

debt due by the arrester's debtor to the arrester; (s) but if he deny his own liability to the debtor there may be a litigation about it of the same kind as if he were being directly sued for it. When the furthcoming is defended a record is made up, and, if necessary, proof allowed, in the same way as in an ordinary action. In modern practice the rule which Erskine stated, that the arrestee's oath was conclusive in this action as to the amount due by him to the arrester's debtor, is not followed.

43. Arrestment of Ships.—As already mentioned, arrestment is the proper diligence for attaching a ship. Even while on the stocks, unfinished, a ship can be taken only in this way (k) The ordinary warrant to arrest, contained in the extract, is sufficient, (l) but there is also a special form of precept for a maritime arrestment. The arrestment is served by the officer going to the ship, along with a witness, and affixing the schedule to the main-mast, or (if there be no main-mast) to the stern post, and chalking over it the letters "V. R." If there be any fear of the ship being removed the officer is at liberty to dismantle it; but if he does this he must take care to have proper assistance, for if he damage the ship, or allow it to be damaged by dismantling, he will be held responsible. (m)

A ship may be arrested in this way even for the debt of a part owner. (n)

The arrestment is completed by bringing an action of sale against the owners of the ship, under which action the ship is sold by public roup, and the proceeds applied in payment of the debt. (o)

(s) *Houston v. Aberdeen Town and County Bank*, 20 July 1849, 11 D. 1490.

(k) *Mill v. Hoar*, 18 Dec. 1812, F.C.

(l) *Clark v. Loos*, 17 June 1853, 15 D. 750.

(m) *Kennedy v. M'Kinnon*, 13 Dec. 1821, 1 S. 228.

(n) *M'Aulay v. Gault*, 6 March 1821, F.C.

(o) Campbell on Citation and Diligence, p. 158.

Distinction between Ordinary and Summary Actions.

PART III.

OF SPECIAL FORMS OF ACTION.

CHAPTER I.

OF THE DISTINCTION BETWEEN ORDINARY AND SUMMARY ACTIONS; OF PETITIONS; AND OF ACTIONS *AD FACTA PRÆSTANDA*.

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| 1. <i>Distinction between Ordinary and Summary Actions.</i>
2. <i>What Actions may begin by Petition.</i> | 3. <i>Proceedings in Petitions.</i>
4. <i>Decrees ad facta præstanda.</i> |
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The subjects to be treated of in this part are of so miscellaneous a description that it seems unadvisable to attempt any other arrangement than that of giving, in an introductory chapter, some general explanations as to the various special forms of action, and then in the following chapter to take the special actions themselves in alphabetical order.

1. Distinction between Ordinary and Summary Actions.—Most of the special forms of action in use are of the kind called summary. The division between ordinary and summary actions has not now the importance which it had before it was made competent to pronounce interlocutors in Vacation time in any kind of action. Summary actions are still defined as those requiring extraordinary dispatch; and (with the exception of actions of Aliment and Removing, which usually commence by summons) all commence by petition. The privilege they have

Distinction between Ordinary and Summary Actions.

of proceeding in Vacation time in the same way as during Session, is almost the only difference between them and ordinary actions, because the differences caused by the form of the initial writ are quite unimportant. There are various of the summary actions, for which there are special forms of process under special Statutes or Acts of Sederunt, or even under special usage; but wherever there is no provision of that kind they are conducted in the usual way under the Regulations of 1839 and the Act of 1853.

2. **What Actions may begin by Petition.**—Where special regulation or settled practice has prescribed that actions shall commence by petition, there is no room for difficulty as to the mode of beginning the action. But there are many cases where it may be competent, according to circumstances, to commence in either way. In such cases the rule is, that the summons is to be used unless special reasons appear for beginning by petition. The Act of Sederunt of 1839 (a) says, that application by summary petition may be made “in all cases which require extraordinary dispatch, and where the interest of the party might suffer by abiding the ordinary *induciae*.” This rule was a repetition of one made in 1825, which was the first general regulation on the subject, although it seems to have been adopted from the local regulations in use among the different Courts prior to that time. Under this rule there was at one time a great deal of useless litigation. The rule is still in force, but since the Act of 1853 passed only two cases seem to have occurred on the subject, and it is unnecessary to go back on the old cases, which proceeded on a very strict view of the application of the words “requiring extraordinary dispatch,” for now that there is no reason for inclining to any particular view they are taken in their ordinary meaning. In one of the cases which have occurred since 1853, certainly an extreme one, it was held that a party suing for specific implement of a contract had no excuse for doing so in the form of a summary petition

(a) A. S. 10 July 1839, § 137 (App. lxiv).

 Proceedings in Petitions.

after a delay of nearly two years before raising the action.(b) In the other case, in which the point as to the form of the writ was raised, since 1853, it was held competent to apply by summary petition for interdict against a person using funds which it was alleged he had shortly before obtained by fraud, and for an order on him to consign them, or, failing consignment, for payment of them.(c) It is a defect, however, in our forms of pleading, that it allows the question as to the form of the initial writ to depend on circumstances of which reasonable men may easily enough take different views, and it would be much better to lay down some general rule.

3. Proceedings in Petitions.—The petition sets forth the grounds for making the demands, and in the prayer the precise demand itself. It may also contain a conclusion for a claim of damage, or other (pecuniary) claim arising out of the subject matter;(d) but as such a claim should properly be brought in an ordinary action, it will be entertained only as incidental to the summary remedy asked. The grounds of action and the remedy must be set forth with the same degree of specification as would be required in a summons, and may be amended on the same principles.(e) It is competent to give a remedy of a more limited character than that claimed,(f) but it is not competent to give more. The formal words, asking the judge “to do otherwise in the premises as he shall think proper,” seem to have no meaning.

On being presented, the Sheriff is to consider the petition; and (if he sees cause) he orders it to be served on the person complained of, and appoints him to enter appearance within a certain short time.(g) He may also pronounce such interim

(b) *Irvine v. Scott*, 27 June 1856, 18 D. 1090.

(c) *Allan v. Munnoch*, 30 Jan. 1861, 23 D. 417.

(d) A. S. 10 July 1839, § 138 (App. lxx).

(e) *Ib.* § 140.

(f) Compare *M'Taggart v. Mac-*

douall, 1 March 1867, 5 Macph. 534, where a party claiming a certain line of boundary got decree for a line falling within it, notwithstanding an objection that he was getting something different from what he had concluded for.

(g) A. S. 10 July 1839, § 137; Act of 1858, §§ 3 and 7.

Distinction between Ordinary and Summary Actions.

order as the exigencies of the case require; ^(h) but this power is seldom used until after hearing the parties, except in the case of interdict. When the *inducia* has expired without appearance being entered, the Sheriff may decern in absence if he sees fit, and if he does so, the decree resembles one in an ordinary action, and may be recalled in the same way. ⁽ⁱ⁾ If appearance be entered, parties are heard, and a record made up in all respects as in an ordinary action. Where the record cannot be closed on a minute, and it is nevertheless necessary (so as to authorise some interim order) that some statement by the defender should be recorded, it would often be convenient to allow answers to be given in, but the competency of this is doubted by some. The provision of the Act of 1853, that the procedure under the petition shall, "as nearly as may be," be the same as in an ordinary action, can, however, hardly be read so strictly as to render the lodging of answers incompetent.

The order for service seems to begin the cause. At that time the petition is presented to the judge for consideration,—whether it is a writ which should be served; and occasionally also whether any other interim order should be pronounced. If this view be correct, the petition will be dismissed under the Act of 1853 if it be not served within three months of that order. Under the old forms a complainer could keep his interim order in his hand for a year—most likely with the defender knowing nothing about it—an abuse which need not now be tolerated. After the writ has been served, a petition, as regards dismissal, must be in the same position as an ordinary action. ^(j)

4. Decrees *ad facta præstanda*.—The enforcing of decrees *ad facta præstanda* is conducted as nearly as possible in the ordinary form. Of course, poinding and arrestment are inapplicable, except as to the expenses, but a charge to obey the decree may be given; and if the defender fail in obedience the

(h) A. S. 10 July 1839, § 187.

(j) See *ante*, p. 188.

(i) *Ib.* §§ 141 and 145.

Decrees *ad facta præstanda*.

charge may be followed by imprisonment. It is necessary to point out that this is the only way in which the defender can be imprisoned; for it is incompetent except (under certain special proceedings) to grant a summary warrant in the course of a petition to imprison the defender for non-compliance, with an order to do what has been asked in the prayer.^(k) The pecuniary limit of £8, 6s. 8d. for decrees below which imprisonment is incompetent, has no reference to decrees of this kind; and though the damage which the pursuer will sustain by non-implement should be much below that sum, imprisonment is competent.^(l) When a defender is in prison on a decree of this kind, and has it in his power to do what is required, he is not entitled to aliment,^(m) nor can he be liberated under the process of *cessio bonorum*.⁽ⁿ⁾

(k) *Murray v. Bisset*, 15 May 1810, F.C.; *Haig v. Buchanan*, 20 June 1823, 2 S. 412; *Morrison v. Cuthbert*, 16 May 1835, 13 S. 772.

(l) 5 and 6 Will. IV, c. 70, § 5.

(m) *Brechin v. Taylor*, 9 March 1842,

4 D. 909. It is otherwise if it is not in the power of the prisoner to do what he is required; *Smith v. Nicolson*, 31 May 1853, 15 D. 697.

(n) 6 and 7 Will. IV, c. 56, § 2 (App. ciii).

 Adjudication.

CHAPTER II.

OF THE VARIOUS SPECIAL ACTIONS.

SECTIONS.

I. ADJUDICATIONS.	XVI. MAILS AND DUTIES—ACTION OF
II. ALIMENT—ACTIONS OF	XVII. MASTER AND SERVANT PROCEEDINGS CONNECTED WITH
III. CESSIO BONORUM.	XVIII. MEDITATIO FUGÆ.
IV. CONSTITUTIONS.	XIX. MULTIPLEPOINDINGS.
V. COUNT AND RECKONING.	XX. POINDING OF THE GROUND.
VI. DELIVERY—ACTION FOR	XXI. POOR LAW—PROCEEDINGS UNDER
VII. ECCLESIASTICAL BUILDINGS AND GLEBES—PROCEEDINGS CONNECTED WITH	XXII. REMOVINGS AND EJECTIONS.
VIII. ENTAILED ESTATES—PETITIONS AS TO IMPROVING, EXCHANGING, FEUING	XXIII. SCHOOLMASTERS — PROCEEDINGS CONCERNING
IX. EXHIBITION—ACTION OF	XXIV. SERVICES OF HEIRS.
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XI. INTERDICTS.	XXVI. SUSPENSIONS.
XII. LAWBURROWS.	XXVII. TAXATION OF AGENTS' ACCOUNTS.
XIII. LUNACY ACTS—PROCEEDINGS UNDER	XXVIII. TRANSFERENCE—ACTIONS OF
XIV. MARCH FENCES—REGULATION OF	XXIX. TUTORS AND CHOOSING CURATORS.
XV. MARITIME CASES.	

Section I.—ADJUDICATIONS.

An action of adjudication is the means by which an heritable estate is taken in payment of a debt; and it is also used, in the form of an adjudication in implement, when a person has a title to an estate of an incomplete kind, and the person from whom he is entitled to exact what is necessary to its completion refuses to fulfil the obligation he is under. All adjudications in use were at one time competent in the Sheriff-Court, but since 1672 they have been competent only in the case of the death of a proprietor whose heir renounces the succession. Even in this case, however, adjudications are now scarcely used in the Sheriff-Court; and, as all the provisions of the recent Conveyancing Acts have been adapted with a view to the Supreme Courts alone, the use of adjudications in

Actions of Aliment.

the Sheriff-Court cannot be recommended until the matter has been put on some more satisfactory footing.(a)

Section II.—ACTIONS OF ALIMENT.

The action of aliment is a summary action, usually commencing by summons. By the Act 1 Will. IV. c. 69,(b) all actions of aliment are competent in the Sheriff-Court. But this must be understood to apply only to cases where not only the conclusions, but the grounds of action also, raise nothing but a question of aliment. Where the grounds of action involve a question of status as the primary ground of liability there is no jurisdiction. Thus, a pursuer founding on an irregular marriage, which is denied, cannot sue for aliment in the Sheriff-Court, because the main question here is whether the parties have been married.(c) On the other hand, if the parties have been publicly married, the action is competent, and the defender would not be allowed to plead in the Sheriff-Court that the marriage was invalid.(d)

The same principle is applicable when any other question of status is raised; for example, the right of married persons to live separate. If a wife sue her husband for aliment, stating that she has been obliged to separate from him on account of ill-treatment, and that she cannot therefore return to him, the action is incompetent in the Sheriff-Court.(e) Again (for the same reasons) if the wife has been turned out of the house, and sues for aliment, the action must be dismissed if the husband offers to take her back. In such cases the Sheriff-Court cannot even award interim aliment, unless, perhaps, in the vacation of the Court of Session, till such time as that Court resumes its sittings.(g) Where no question of status is involved,—as in a case

(a) See 1 Bell's Com., 5th ed., 701; Erskine 2, 12, 39; 1672 c. 19.

(b) § 32 (App. iii). Actions of aliment seem to have been competent in the Sheriff-Court before the Statute, and the Statute does not seem to have had any effect in extending the Sheriff's power.

(c) *Benson v. Benson*, 14 Feb. 1854, 16 D. 555.

(d) *M'Leod v. Telfer*, 9 June 1820, Hume, 10.

(e) *Braick v. Braick*, 19 Dec. 1829, 8 S. 284.

(g) *Per curiam* in *Braick's case*, *supra*.

 Process of *Cessio Bonorum*.

of father and son, where the relationship is admitted—there is jurisdiction. In the case of illegitimate children, no question of status is raised even though the paternity is disputed.

Aliment being a debt, the amount of which cannot be fixed for any definite period in certain cases, as the liability may vary with the circumstances of the payer and receiver, care should be taken that judgment is not pronounced, in such cases, in such a form as to prevent the rate being altered at any future time.(h) Debtors in aliment are liable to imprisonment for the debt, and also for the expenses incurred in constituting it, although the amount be under that of £8, 6s. 8d., for which imprisonment for ordinary civil debts is incompetent.(i)

 Section III.—PROCESS OF CESSIO BONORUM.

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| 1. <i>Who may apply.</i> | 9. <i>Judgment.</i> |
| 2. <i>Jurisdiction.</i> | 10. <i>Appeals.</i> |
| 3. <i>Form of Application.</i> | 11. <i>Interim protection of Debtor.</i> |
| 4. <i>Intimation of Application.</i> | 12. <i>Cases remitted from Court of Session.</i> |
| 5. <i>Production of Accounts, and of Evidence of Intimation.</i> | 13. <i>Renewing Application.</i> |
| 6. <i>Appearance of Creditors.</i> | 14. <i>Oath on getting Decree.</i> |
| 7. <i>Examination of the Debtor.</i> | 15. <i>Disposition omnium bonorum.</i> |
| 8. <i>Hearing Parties and disposal of objections.</i> | |

The process of *cessio bonorum* is a process by which an insolvent applies for personal protection from imprisonment, or for liberation from prison, on condition (as the name shows) of giving up to his creditors his whole property. Formerly it was competent in the Court of Session only, but since 1836 it has been equally competent in the Sheriff-Court. It is a summary action, commencing by petition, and is regulated by the Act 6 and 7 Will. IV, c. 56, and relative Act of Sederunt of

(h) *Thom v. Mackenzie*, 2 Dec. 1864,
3 Macph. 177.

(i) *Cheyne v. M'Gungle*, 19 July 1860,
22 D. 1490.

Who may apply—Jurisdiction.

6th June 1839.(k) The provisions of the Act of 1853 seem inapplicable.(l)

1. Who may apply.—The persons who may apply for decree of *cessio* are those who are actually in prison for civil debt, or against whom a warrant of imprisonment has been issued, or a Small Debt decree pronounced on which imprisonment is competent, or who have been imprisoned for a civil debt and liberated.(n) Provided the debtor be liable to civil imprisonment for the debt, the particular amount is immaterial; and there is no rule that a debtor imprisoned for aliment cannot get the benefit of *cessio*.(o)

Persons sequestered under the Bankruptcy Statutes are not debarred from applying. In their case it may be as necessary as in other cases, because their creditors may refuse them personal protection.(p) But when they apply they must produce a certificate under the hands of the trustee, or of the commissioners, stating how far they have complied with the provisions of the Bankruptcy Statutes; and, in particular, how far they have made a full and fair surrender of their estates;(q) and though this certificate should be unfavourable, the case is investigated and disposed of on its own merits.(r)

2. Jurisdiction.—The application must be made to the Sheriff of the county in whose territory the applicant is domiciled.(s) If he leaves Scotland after applying, he is not bound to sist a mandatory,(t) and, on the same principle, a mandatory is unnecessary though the debtor should be out of Scotland at

(k) Both printed in Appendix, Part II, C. II, p. ciii.

(l) See a full note on this point by Mr Sheriff Cook, 4 *Scottish Law Magazine*, p. 40.

(n) 6 and 7 Will. IV, c. 56, § 2.

(o) *Cassels v. Keddies*, 27 Nov. 1852, 15 D. 124; *Chisholm v. Paterson*, 2 Dec. 1856, 19 D. 116.

(p) See *M'Kellar v. Livingstone*, 13 June 1860, 22 D. 1180.

(q) This certificate is provided for by the Act of Sederunt, § 10 (App. cxii).

(r) *M'Kellar*, *ut supra*.

(s) Act, § 3 (App. ciii).

(t) *Hossack v. Laidlaw*, 16 Dec. 1841, 4 D. 268.

Process of *Cessio Bonorum*.

the time of presenting the application. A foreigner coming to Scotland, owing nothing but foreign debts, will not be allowed to make the application here, though, if he were liable to imprisonment in Scotland, the case would be different.(u)

3. *Form of Application*.—The form of the petition is given in the Act of Sederunt, and sets forth, as required by the Act of Parliament, the grounds on which the debtor is imprisoned or is liable to imprisonment, his inability to pay his debts, and his willingness to surrender his estate for behoof of his creditors.(v) The petition farther sets forth that the inability to pay has not been occasioned by fraud, but has arisen solely from misfortunes and losses. Those precise words, however, do not seem necessary, but the facts embodied by them must appear in some shape on the face of the petition, otherwise it would not be relevant.(x) In the petition the debtor gives a list of all his creditors, with their names, designations, and residences so far as known to him; and in this list he should name (with a view to saving future trouble) all who make any claim against him, founded or unfounded. The Statute (§ 3) authorises the prayer of the petition to be for *interim* protection against the execution of diligence, and for decree of *cessio bonorum*. As given in the form of petition annexed to the Act of Sederunt, the prayer is somewhat fuller; and is so framed as to impose certain limits on the discretion of the Sheriff in regard to the granting of *interim* protection. Along with the petition is produced certain evidence of the petitioner's liability to imprisonment,(y) and the prescribed form of petition narrates what it consists of.

4. *Intimation of Application*.—On the petition being presented the Sheriff issues a warrant appointing the debtor to publish a notice of the presentation in the *Edinburgh Gazette*, requiring

(u) *Shilleto*, 20 March 1862, 24 D. 848.

(v) Appendix, p. cxiv.

(x) See *Struthers v. Her Creditors*, 3 July 1868, 6 Macph. 980.

(y) Act 6 and 7 Will. IV, c. 56, § 3.

 Production of Accounts, and of Evidence of Intimation.

all the creditors to appear in Court on a certain day, which must be not less than thirty days from the date of the publication of the *Gazette* notice. The Sheriff's order farther directs the debtor either to send post-paid copies of that notice to all his creditors within five days after the date, or, in his option, to cite them to appear in terms of law.(z) The notice must always show the name of the petitioner's agent.(a) If any of the creditors be cited, the citations must be given within ten days after the *Gazette* notice.(b) The Sheriff's order on the petition farther ordains the debtor to appear for public examination on the day appointed for the meeting of the creditors.

5. Production of Accounts, and of Evidence of Intimation.—

On or before the sixth lawful day prior to the day appointed for examination, the debtor must lodge with the Sheriff-clerk a state of his affairs, subscribed by himself, together with all his books, papers and documents relating to those affairs. These are to be lodged for the purpose of being made patent to all concerned.(c) If the debtor fail to produce them, the Sheriff must dismiss the process, unless the debtor show that he had sufficient excuse; in which case the Sheriff may order new intimation to the creditors, or make such other order as he may think necessary.(d)

Also, on or before the sixth lawful day prior to the examination day, the debtor is to produce evidence of due intimation,—consisting of a copy of the *Gazette*, and either a certificate of the posting of the letters to the creditors, or an execution of citation against them. It is prescribed that the certificate of the letters having been posted shall state the date and place of posting; that the postage was paid; that the letters were severally addressed as specified in the petition,(e) repeating the particular address of each letter as sent.(g) The

(a) Act 6 and 7 Will. IV, c. 56, § 4.

(a) A. S. 6 June 1839, § 2.

(b) A. S. § 3.

(c) Act, § 4.

(d) A. S. § 7.

(e) Act, § 4.

(g) A. S. § 5.

Process of *Cessio Bonorum*.

certificate is to be subscribed by the debtor's agent, or by a messenger or sheriff-officer and a witness.(h)

6. Appearance of Creditors.—The creditors are not required to lodge any notice of appearance, but they appear by themselves, or by an agent, at the diet for the examination of the debtor. When an agent appears for a creditor, he must produce either the letter sent to the creditor, or the citation served on him, or a mandate subscribed by him.(i) If it be objected that all the creditors have not been called, the objection should be disposed of before proceeding to the examination. The objector lodges a list signed by himself or his agent, specifying the names and designations (in so far as known) of the creditors alleged to be omitted. The Sheriff has power to dispose of this objection as he sees cause. If it turn out to be well founded, he may dismiss the process; or, before inquiring into the merits, he may appoint intimation to the omitted creditors. This intimation is to be given either by citing them (if within Scotland) to appear within six days, or by calling them (whether in Scotland or not) by letter to appear within fifteen days. If the objection turn out to be ill-founded, the objector will have to pay the unnecessary expenses.(k)

Where such an objection is taken, the Sheriff may either proceed with the examination of the debtor, and leave the omitted creditors to apply, when they appear, to have another diet fixed for his re-examination,(l) or he may at once adjourn the diet to a day on or after that at which the omitted creditors will appear.(n)

7. Examination of the Debtor.—The examination is taken by the Sheriff in public court, in presence of the creditors. The Sheriff may put the debtor upon oath or affirmation, and the debtor is bound to answer all questions pertinent to his affairs

(h) Act, § 4.

(i) A. S. § 18.

(k) A. S. § 8.

(l) A. S. § 9.

(n) Act, § 5.

Hearing Parties and Disposal of Objections.

which may be put to him by the Sheriff, or by any creditor with the approbation of the Sheriff.(o) The examination will naturally be directed to such points as the amount of the debts or assets, and the causes of the insolvency; and though there be no opposition, the Sheriff must satisfy himself that the difficulties have been caused by innocent misfortunes, because the protection is not to be granted as a matter of course.(p) If the debtor, without lawful cause, refuse to take the oath or affirmation, or to answer any pertinent question, or to sign his deposition (which is taken like the deposition of a witness examined on a commission) decree of *cessio* must be refused *in hoc statu*.(q)

As mentioned at the close of the preceding article, the Sheriff may adjourn the examination, or appoint the debtor to appear for re-examination.

8. Hearing Parties and Disposal of Objections.—At the end of the examination the Sheriff hears parties *viva voce*. If objections are stated by opposing creditors, he makes and signs a note of them,(r) and of the debtor's answers thereto.(s) If he finds it necessary, he may then allow a proof to the parties;(t) and where the deposition of the debtor shows a case for granting *cessio*, the *onus* of proving the objections lies on the creditors.(u) When a proof is allowed the Sheriff is recommended by the Court of Session to specify, under articulate heads, the several facts to be proved by either party.(v) A diet is then fixed in the usual way, and the evidence may be taken down either by way of notes, or like a proof on commission.(x) On the evidence being concluded, the Sheriff may again hear parties *viva voce*, and, though not much purpose can now be served by it, he is directed again to make a note of objections and

(o) Act, § 5.

(p) *Wright v. Brown*, 9 Feb. 1856, 18 D. 576.

(q) Act, § 5.

(r) Act, § 6.

(s) A. S. § 15.

(t) Act, § 6.

(u) 2 Bell's Com. (5th ed.) 592.

(v) A. S. § 9.

(x) A. S. § 14.

 Process of *Cessio Bonorum*.

answers.(y) It is assumed that all adjournments necessary for the proper disposal of the objections may be made, but before granting an adjournment it should be kept in view that the statute directs that the most summary dispatch, consistent with the forms of process, shall be given.(z)

9. Judgment.—The Sheriff's judgment either grants decree of *cessio* or refuses it *in hoc statu*; and when decree is granted, it may be either unconditionally, or under a declaration that it is not to be available as a protection for a given time. Where the Sheriff refuses decree *in hoc statu*, or grants it subject to a limitation, he must state the grounds of his decision.(a) The decree always implies, and generally expresses, that the debtor shall, when required, grant to his creditors a disposition *omnium bonorum*; and it names (or provides for the naming of) a trustee to act for the creditors.(b)

Decree of *cessio* ought not to be granted where the debtor has been guilty of fraudulent conduct.(c) Where he conceals funds, or refuses information, the decree is refused *in hoc statu*, and it depends on the bankrupt's further conduct how the application will ultimately be disposed of.(d)

Creditors unnecessarily opposing a *cessio* are liable in expenses; but in judging of the necessity for opposition it is to be kept in view that the creditors are entitled to the fullest information from their debtor, and that no opposition is unnecessary where it is neither frivolous or vexatious, but is directed to the finding out of whether the debtor has a just right to a personal protection.(e) In such cases it may even be proper, and it is competent, to give expenses in favour of the opposing creditors, notwithstanding that decree of *cessio* has ultimately been granted.

(y) A. S. § 16.

(z) Act, § 6.

(a) Act, § 6.

(b) Act, § 16.

(c) *Russell v. Hedderwick*, 11 Feb. 1860, 22 D. 754.

(d) *Manson v. National Bank*, 27 Nov. 1844, 7 D. 159; *Galloway v. Kirkpatrick*, 3 March 1846, 8 D. 580.

(e) *Wright v. Brown*, *supra*, note (p).

Appeals—Interim Protection of Debtor.

10. Appeals.—When the Sheriff-Substitute pronounces a decree either granting or refusing *cessio in hoc statu*, or granting it conditionally, it is competent to reclaim against his decision. This is done (somewhat in the old manner) by addressing the reclaiming petition to the Sheriff-Substitute; and the petition is not laid before the Sheriff unless the complainer intimates his desire that it should be so, in the event of the Sheriff-Substitute being disposed to refuse it. The reclaiming petition must be lodged within six days;(g) and it is competent to order answers to it.(h) No appeal is provided for, under the Statute, against any other kind of interlocutor, and as the most summary dispatch is to be given,(i) it would appear there is no right of review except on the merits. Of course when a case goes before the Sheriff on a competent appeal, he will have full power to set anything right which he may think the preliminary interlocutors have left in an unsatisfactory condition.(k)

11. Interim Protection of Debtor.—While the proceedings are going on in Court, interim protection or liberation may be granted. This interim protection must be specially asked; but the application may be contained in the principal petition, provided it be specially mentioned in the advertisement and notice.(l) If it be in a separate petition, a copy must be served on the agent or agents of the opposing creditors at least forty-eight hours before moving it in Court. In either case the application must set forth the amount of caution, and the name of the cautioner offered.(n)

The statute provides that the Sheriff may grant interim protection on production of the evidence of intimation;(o) but the Act of Sederunt has prescribed that he must not grant it until after the diet for the appearance of the creditors.(p) The

(g) Act, § 7.

(h) A. S. § 17.

(i) Act, § 6.

(k) Compare *Galbraith v. Ritchie*, 6 Dec. 1856, 19 D. 186; and see the noteby Mr Cook referred to *ante*, p. 257, note (l).

(l) A. S. § 4.

(n) A. S. § 11.

(o) Act, § 15.

(p) A. S. § 6.

Process of Cessio Bonorum.

Court of Session have here re-established a rule of the old common law, which the Act of Parliament was apparently intended to alter, and which they have actually held it to alter in their own case.(q)

The interim protection is granted on caution, for a sum fixed by the Sheriff, that the debtor will attend all diets of Court, whenever required. If forfeited, the amount in the bond must be divided amongst the creditors; but it could not well be forfeited unless the debtor had failed to attend after having been specially ordained to attend at the diet, and after intimation of the order having been made to the cautioners.(r)

The warrant of interim protection and liberation is good in all parts of Scotland.(s)

It is not competent by an appeal or by a reclaiming petition to suspend the effect of the warrant of protection; but on a reclaiming petition (to be presented and dealt with in the same way as one upon the merits) the warrant may be recalled.(s)

For the limited purpose of attending the examination, it is competent for the Sheriff to grant a warrant to bring the debtor from and take him back to prison ;(s) and this warrant, like the more general warrant of protection, is valid throughout Scotland.

12. Cases remitted from Court of Session.—When a process of *cessio* has been commenced in the Court of Session, it is competent to remit it to the Sheriff of the county of the debtor's domicile, for the purpose of taking the examination. When such a remit is made the Sheriff takes the examination in the usual way, and reports the case to the Court of Session.(t)

13. Renewing Application.—Where decree of *cessio* has been refused in the Sheriff-Court *in hoc statu*, the application may

(q) *Anderson*, 20 Feb. 1849, 11 D. 679; *Marnoch*, 4 March 1857, 19 D. 598.

(r) A. S. § 20.
(s) Act, § 15.
(t) Act, § 12.

Oath on getting Decree—Disposition *Omnium Bonorum*.

be renewed at any time. The debtor does this by a minute, which must be intimated by posting prepaid letters to each creditor. The fact of the dispatch of these letters must be established by satisfactory certificates, and the case cannot be taken up till twenty days after the date of the dispatch. Where the original application was to the Court of Session, the debtor may either renew it there, or he may present a new petition to the Sheriff. In the latter event the proceedings are conducted as if no former application had been made.(u)

14. Oath on getting Decree.—On getting decree of *cessio* the debtor is bound to take an oath or affirmation that the state of affairs given up is true to the best of his knowledge and belief, and that he has no property except what he has made known and given over to his creditors. The form of oath is prescribed by the Act of Sederunt.(v)

15. Disposition *omnium bonorum*.—It is optional to require the debtor to execute a disposition *omnium bonorum* in favour of the trustee mentioned in the decree of *cessio*; and as the Act (§ 16) provides that the decree itself is to operate as an assignation of the debtor's moveable property, it is unnecessary to take one unless the debtor has any heritable estate. Where such a disposition is wanted, the better plan is not to give the protection till it has been signed. There is a convenience, where this is not done, in putting the obligation expressly in the decree, because in that case, if the debtor refuse to grant the disposition, the decree may be extracted by the incarcerating creditor, and the debtor again imprisoned under it, as under a decree *ad factum præstandum*.(w) The decree has to be executed at the cost of the creditors.

(u) Act, § 17; A. S. § 22.

(v) App. p. cxvi.

(w) *Taylor v. Macdonald*, 21 Jan. 1854,
16 D. 378.

 Action of Constitution.

 Section IV.—ACTION OF CONSTITUTION.

Every action for payment of debt is in one sense an action of constitution, but the term is specially applied to actions brought against the representatives of deceased debtors.

When the deceased debtor is represented by executors who have confirmed, the action is in the common form, and concludes against the executors, as such, for payment of the debt. The conclusion for expenses should, however, be so worded as to ask for them in the event only of the claim being opposed; for it is a rule of Court that a creditor is bound to constitute his debt against his debtor's representatives at his own expense. If the action, however, be opposed, it is held to be no longer in the position of a mere constitution, but to become a different kind of process; and in that case the party who is unsuccessful is liable in the usual way in the whole expenses.(x)

Where the persons entitled to the office of executor to the deceased debtor have not taken steps to have themselves confirmed, the creditor cannot (except in two cases) bring his action of constitution against them without first "charging"(y) them to take up the office. The excepted cases are where those persons have acted as executors without authority, or where the creditor means to be content with what is called a decree *cognitionis causa tantum*, which gives him right to attach the goods of the deceased debtor for his debt, but imposes no kind of obligation on the persons called as defenders.(z) In bringing the action, the next of kin of the deceased, and any persons he may have nominated as executors by will, are cited as defenders. As in the case of actions against confirmed executors, expenses should not be asked unless the action is opposed. If the action have been brought for the ordinary decree, the conclusions may be restricted to ask decree of cog-

(x) *Smith v. Kippen*, 19 July 1860, 22 D. 1495.

proceeds on letters passing under the Signet.

(y) The charge to confirm as executor

(s) *Forrest v. Forrest*, 26 May 1863, 1 Macph. 806.

 Action of Count and Reckoning.

nition only, but in such a case the defenders would be entitled to the expense of appearing to get this restriction made. Where, however, a charge has been given, and the persons entitled to be executors pay no attention to it, either by confirming, or by renouncing the succession, they may be found liable in any expenses their negligence may occasion.(a)

Actions of constitution against the heir of a deceased debtor, with the view of afterwards adjudging heritage, are competent in the Sheriff-Court.

 Section V.—ACTION OF COUNT AND RECKONING.

The action of Count and Reckoning, which is in an ordinary action commencing by summons, is an action in which the pursuer concludes against the defender for exhibition of all accounts between them, and for payment of the balance due on a settlement of those accounts. The action usually contains an alternative conclusion for payment of a specified sum in the event of no accounting taking place; but this conclusion is not essential, and if it have been omitted it may be supplied on an amendment.(b) The use of this conclusion is to enable the pursuer to get a decree for a definite sum in the event of the defender failing to appear, or appearing and failing to account. Should the accounting be gone into, the sum specified does not limit the pursuer's claim; but he gets whatever turns out to be due, whether it be less or more.(c)

In an action of count and reckoning it seems necessary, where the defender insists on it, to make up and close a record before ordering production of the accounts. Should the defender agree to produce them before having a record, the condescendence and defences may contain the pursuer's objections to

(a) *Davidson v. Clark*, 13 Dec. 1867, 6 Macph. 151.

expenses on amending must of course be complied with.

(b) *Dobson v. Hughson*, 17 Feb. 1858, 20 D. 610. The usual conditions as to

(c) *Spottiswoode v. Hopkirk*, 17 Nov. 1858, 16 D. 59.

Proceedings concerning Ecclesiastical Buildings and Glebes.

the accounts (if he has any) and the defender's replies to those objections. Where the record is closed before the accounts are lodged, it will in general be necessary to allow objections and answers to be stated to the account in a separate form.(d)

Section VI.—ACTION OF DELIVERY.

An action for delivery of any article, brought by a person entitled to its possession against one who has possession without a sufficient title, may, according to circumstances, be either an ordinary action commencing by summons, or a summary petition. If it contain no conclusions except for delivery of the article, and for expenses, it may be brought in the jurisdiction of the place where the article is, as well as in that of the defender's domicile.(e) When brought, it is conducted in common form.

Section VII.—PROCEEDINGS CONCERNING ECCLESIASTICAL BUILDINGS AND GLEBES.

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| 1. <i>Ecclesiastical Buildings and Glebes Act, 1868.</i> | 8. <i>Conduct of Proceedings in Sheriff-Court.</i> |
| 2. <i>How Proceedings removed from the Presbytery.</i> | 4. <i>Appeal to the Lord Ordinary.</i> |

1. *Ecclesiastical Buildings and Glebes Act 1868.*—By the Ecclesiastical Buildings and Glebes Act of 1868 certain proceedings which were formerly commenced and concluded in the Presbyteries of the Established Church of Scotland can now be removed from those tribunals to the Court of the Sheriff at any time that any of the interested parties becomes dissatisfied with their determination.

The proceedings in question are those relating to the building, rebuilding, repairing, adding to, or making other alterations on churches or manses, or to the designing or ex-

(d) See *ante*, p. 159, art. 16.

(e) See *ante*, Part I, Chap. IV.

How Proceedings Removed from the Presbytery.

camping of sites for those buildings, or of glebes, or of additions to glebes, or of sites for churchyards, or additions to churchyards, and proceedings relating to the suitable maintenance of all such subjects, specially including the building or repairing of churchyard walls.(g)

2. How Proceedings Removed from the Presbytery.—The proceedings are to be begun before the presbytery in the manner hitherto in use, but upon any order, finding, judgment, interlocutor or decree, being pronounced by the Presbytery, with which the minister of the parish, or any heritor, shall be dissatisfied, he may appeal the whole cause within twenty days from the date of the deliverance.(h)

The appeal is taken by presenting a summary petition to the Sheriff of the county in which the parish is situated, praying him to stay the proceedings before the Presbytery and to dispose of the same himself. If the parish is in more than one county, the petition may be presented to and disposed of by the Sheriff of either.(i)

The petition is to be intimated, within ten days of presentation, to the heritors and their clerk, to the minister of the parish, and to the Clerk of the Presbytery, by circular, in the manner provided for in the Statute.(k) This intimation is to be made by the petitioner's agent without any special order, but the Sheriff must satisfy himself that it has been duly made, and if he discover any defect he must cause it to be remedied.(l)

When the appeal is duly made and insisted in,(n) it has the effect of staying any further progress before the Presbytery, and the proceedings must be concluded before the Sheriff-Court, or (under appeal from it) by the Lord Ordinary. On the appeal

(g) 31 and 32 Vict. c. 96.

(h) Act, § 3. All deliverances by the Presbytery not thus appealed from are final.

(i) Act, § 4.

(k) Act, § 5. If the heritors exceed forty, notice on the church door and ad-

vertisement may be substituted for the circulars to them.

(l) Act, § 5.

(n) If the original appellant do not insist in the appeal, the minister, or any heritor, or the heritors' clerk, or the Presbytery-clerk, may insist in it. Act § 2.

Proceedings concerning Ecclesiastical Buildings and Glebes.

being intimated, the Presbytery-clerk will have to transmit to the Sheriff-clerk the previous proceedings in the same way as any other Court would have to do on an appeal being taken from it. Of the references to the proceedings contained in minute books or other books belonging to the Presbytery, the appellant will have to produce certified copies.

3. Conduct of Proceedings in Sheriff-court.—The Sheriff's first duty in the petition is to inquire into the circumstances, and hear the parties or their agents. This he is to do without written pleadings, unless he sees fit specially to order them. He is to take a note of the proceedings, and of any evidence which may be laid before him, and then he is to dispose of the petition as shall be just.(o) In addition to the general regulations, of which the substance has here been given, the Act contains special regulations as to how the inquiry is to be made in each of the several kinds of proceeding with which the Act deals, but these it would be needless to repeat here. The Sheriff may dispose of all questions of expenses.(p)

4. Appeal to the Lord Ordinary.—All deliverances by the Sheriff are final and conclusive, and not subject to review, unless an appeal shall be taken to the Lord Ordinary. This appeal may either be written on the end or margin of the deliverance, or be contained in a separate note, duly signed by the appellant or his agent, and dated.(q) It must be taken within twenty days of the date of the deliverance(r); and within two days of the appeal being taken the Sheriff-clerk must give notice to the respondent.(s) The effect of an appeal is to transfer the whole cause to the Lord Ordinary, and to give him the full powers which the Sheriff could have exercised, in so far as those are not limited by deliverances which have become final. Counter

(o) Act, § 8.

(p) Act, § 15.

(q) Act, § 16.

(r) Act, § 17. During this time extract is incompetent.

(s) Act, § 19.

 What Proceedings Competent—Constituting Improvements.

appeals are unnecessary, and any party interested may insist in an appeal if the original appellant withdraw.(t)

 Section VIII.—PROCEEDINGS WITH REFERENCE TO ENTAILED ESTATES.

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|---|---|
| 1. <i>What Proceedings Competent.</i> | 7. <i>What Lands may be Feued, &c.</i> |
| 2. <i>Constituting Improvements.</i> | 8. <i>How authority to Feu, &c., obtained.</i> |
| 3. <i>Erecting Mansion-Houses.</i> | 9. <i>Appeal from Sheriff's decrees.</i> |
| 4. <i>Exchange of Entailed Lands.</i> | 10. <i>Charters, &c., to be recorded.</i> |
| 5. <i>Feuing Entailed Estates.</i> | 11. <i>Feuing Sites of Churches, Schools, &c.</i> |
| 6. <i>Conditions on which Feuing, &c., competent.</i> | |
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1. *What Proceedings Competent.*—Several proceedings with reference to entailed properties are competent in the Sheriff-Court. Under the Montgomery Act (u) proceedings for constituting the costs of improvements as charges against the estate, and for exchanging limited quantities of land with neighbouring proprietors, are competent before the Sheriff; and in the Entail Amendment Act of 1868,(v) provisions of a very important kind are contained, giving power, with the Sheriff's authority, to feu, grant leases, or dispone on payment of a ground annual.

2. *Constituting Improvements.*—The Montgomery Act provides that the proprietor of an entailed estate who lays out money (not exceeding four years' free rent, as the estate shall stand at the date of his death) in inclosing, planting, or draining, or in erecting farm-houses, or offices,(x) for the improvement of the estate, is a creditor of the succeeding heirs for three-fourths of the sum laid out. The proprietor beginning to

(t) Act, §§ 18 and 20.

(u) 10 Geo. III, c. 51 (1770). The Act is not applicable to entails granted after 1st August 1848, unless specially declared to be so; 16 and 17 Vict. c. 94.

(v) 31 and 32 Vict. c. 84.

(x) Cottages for labourers and others (23 and 24 Vict. c. 95; and 31 and 32 Vict. c. 84, § 12), and private roads (11 and 12 Vict. c. 36, § 20), are now included.

Proceedings with reference to Entailed Estates.

improve must give three months' notice to the next heir, specifying the improvement intended, and must lodge a copy of this notice with the Sheriff-clerk of the county where the lands are. During the progress of the works he must annually lodge with the Sheriff-clerk an account of the money expended, together with the relative vouchers. On the completion of the improvements the proprietor may bring a process before the Sheriff to ascertain the amount of the sums so expended. This action is brought before the Sheriff of the county in which the improved lands lie, and is directed against the next heir of entail. The proprietor produces proper evidence of the amount laid out, and the next heir, or any other heir who chooses to appear, may produce proper evidence to set aside or diminish the claim. The Sheriff pronounces a decree for such part of the sum as, under the Montgomery Act, forms a competent charge against the succeeding heirs. Unless appealed from within six months to the Court of Session, the decree is final.(y)

The Montgomery Act provides for the executors or assignees of the improving proprietor making good the decree against the succeeding heirs; and in the Rutherford Act there is a provision authorising the improving proprietor to grant bonds of annualrent for the amount.(z)

3. Erecting Mansion-Houses.—The Montgomery Act contains provisions, similar to those just noticed, providing for the erection and repair of mansion-houses and relative offices on entailed estates, and for the ascertainment of their cost by the Sheriff.(a)

4. Exchange of Entailed Lands.—The proprietors of entailed estates may make exchanges of small parcels of their lands with

(y) 10 Geo. III, c. 51, §§ 9 to 25. *Duncan's Manual of Summary Entail Procedure*, cap. xiii.

(z) 11 and 12 Vict. c. 36. This Act also contains provisions for the benefit of

those who cannot get their improvements constituted in the Sheriff-court, by reason of having failed to comply with the terms of the Montgomery Act.

(a) 10 Geo. III, c. 51, §§ 27 to 31.

Feuing Entailed Estates—Conditions on which Feuing, &c., competent.

the neighbouring proprietors. The quantity must not exceed 300 acres of land, lying together in one place or plot;(b) and an equivalent in land contiguous to the entailed estate must be received in exchange. The value of the land is ascertained on the proprietor of the entailed estate presenting an application for that purpose to the Sheriff of the county where the estate is situated. On this application, the Sheriff appoints two or more skilled persons to inspect the lands and settle the marches thereof, and to report, upon oath, whether the exchange will be just and equal. On their reporting that it is, the Sheriff authorises the exchange to be made; and on the same being executed and recorded in the Sheriff-Court Books within three months of the execution, the land added to the entailed estate becomes subject to the entail, and the land given off free from the entail.(c)

5. Feuing Entailed Estates.—The Entail Amendment Act of 1868 gives power to heirs of entail in possession to grant building leases, or feus, or dispositions under reservation of a ground-annual, of certain parts of the entailed estates. The power may be exercised notwithstanding any prohibitions or limitations in the deed of entail, or in any Act of Parliament.

6. Conditions on which Feuing, &c., competent.—Leases under the Act must not exceed ninety-nine years in duration, and, where feus are granted, it is provided that the entry of heirs and singular successors is to be taxed at a nominal sum of one penny. It is only when the estate is held by burgage tenure that dispositions on payment of a ground-annual are competent. The annual payment in every case must be fair and adequate, and no grassum, fine, or consideration of any kind, except the annual payments, must be taken. The contract (whether feu-charter, lease, or disposition) must contain such conditions as the Sheriff thinks essential for securing the annual payment, and a condition that buildings of the annual value of at least

(b) 31 and 32 Vict. c. 84, § 14.

(c) 10 Geo. III, c. 51, §§ 82 and 33.

Proceedings with reference to Entailed Estates.

double the annual payment be erected within five years of the date, and thereafter kept in good, tenantable, and sufficient repair. The contract must also contain any other conditions to which the Sheriff may see fit to subject it. The Act declares that if any fine be taken, or that if buildings be not erected and kept in repair as required, the contract shall be null and void.(d)

7. **What lands may be Feued, &c.**—The lands thus to be leased, feued, or disposed, may consist of any part of the entailed estate, excepting the garden, orchards, policies, or enclosures adjacent to or in connection with the manor place, in so far as such garden, orchards, policies, or enclosures are necessary to the amenity of the manor place. Minerals, and the right of working the same, are specially reserved from the power to feu or dispose; and under the leases the law would reserve them.

8. **How authority to Feu, &c., obtained.**—The authority to feu, lease, or dispose, in this way, is obtained by the heir in possession on presenting an application to the Sheriff of the county within which the entailed estate, or the part proposed to be dealt with, is situated. No form for this petition is prescribed, but it will naturally refer to the Act, and then set forth the lands that are proposed to be dealt with, the petitioner's title to them, the name and designation of the next heir, the conditions on which it is proposed to feu, lease, or dispose, and the annual payment that it is proposed to exact. The prayer may be for an order to intimate to the next heir for a remit to persons of skill (whose names should *not* be suggested) to examine and report, and then for authority to feu, lease, or dispose (taking the words from the Act, and using one or more of the alternatives as desired) the specified lands on the conditions set forth. Notice of this application must be given to the next heir of entail in such manner as the Sheriff shall

(d) 31 and 32 Vict. c. 84, §§ 3, 4, and 5 (App. cxix).

Appeal from Sheriff's Decree.

deem proper. If the next heir be under age, or subject to any legal incapacity, the Sheriff is to appoint a tutor or curator *ad litem* to attend to his interests. The next step is to remit to one or more skilled persons to inquire and report (1) as to the value of the lands proposed to be dealt with; and (2) whether, from their position or otherwise, they may or ought to be so dealt with in terms of the Act, either in whole or in lots. On the skilled persons reporting that the annual payment proposed is in their opinion, having regard to all the circumstances, fair and adequate, and that the lands may from their position be dealt with, in terms of the Act, either in whole or in lots, the Sheriff, on consideration of the whole circumstances, may grant the required authority. The Sheriff's deliverance will authorise the heir in possession, or his successors in the entailed estate, at any time within ten years from its date, to feu, lease, or dispoise the land in one or more lots, at such rate of annual payment as he can obtain, not being less than the rate fixed by the reporters. The deliverance must specially subject the right to feu, lease, or dispoise, to the conditions which the Sheriff thinks essential for securing the annual payment; and should he see fit to subject it to other conditions, the deliverance must set them forth. The condition, that entries are to be taxed at one penny, requires also to be inserted; and the deliverance will conclude by giving authority to grant all the necessary feu charters, leases, or dispositions.

9. Appeal from Sheriff's decree.—The decree of the Sheriff is not liable to review except by note of appeal to be presented to the Court of Session in one or other of the Divisions thereof, to be disposed of there as a summary cause. This note of appeal must be lodged with the clerk of the Division, and written notice of it must be given to the opposite party, or his known agent, or lodged with the Sheriff-clerk, within six months of the date of the decree, otherwise the decree will be final and conclusive. In the event of an appeal, the judgment of the Court of Session is final and conclusive.

Action of Exhibition.

10. *Charters, &c., to be recorded.*—The feu-charter, lease, or disposition, on being executed, must be recorded in the Register of Sasines, and from that date will be effectual to all intents and purposes, taking the lands conveyed (so long as it remains in force) out of the entail, and (in lieu thereof) leaving under the entail the superiority of the lands, and the annual payment.

11. *Feuing Sites of Churches, Schools, &c.*—The powers to feu, lease or dispose contained in the Entail Amendment Act of 1868, not being hampered with any conditions as to the purposes for which the buildings to be erected are intended, will probably supersede any statutes giving powers to feu for special purposes, although there are also some of these statutes which allow of proceedings in the Sheriff-Court. For example, the Act 3 & 4 Vict., c. 48, § 1, provides for feuing or leasing lands, with the authority of the Sheriff, for places of public Christian worship, schools, burying-grounds, play-grounds, and dwelling-houses and gardens for ministers and schoolmasters, but as the proceedings are more complicated than under the Entail Amendment Act of 1868, and the powers less extensive, no advantage could well be got by going back to it.

Section IX.—ACTION OF EXHIBITION.

The action of exhibition is the special name given to the action of delivery, when what is wanted to be delivered up is a deed or other writing. It is conducted in all respects like an ordinary action of delivery. Sometimes a special form of it is used, when the delivery is wanted, in the first place at all events, only for the purpose of examining the writs; as when an heir wants to inspect the writings belonging to his ancestor, with the view of seeing whether he should take up the succession. The action is competent in the Sheriff-Court though the deed relate to an heritable right, provided that the action itself raise no question of heritable title.(c)

(c) *Burnet v. Morrow*, 19 March 1864, 2 Macph. 929.

Action for Forfeiture of Feu-Rights.

Section X.—ACTION FOR FORFEITURE OF FEU-RIGHTS.

Where the feu-duty for subjects which do not exceed £25 in annual value has run in arrear for two years, the Sheriff has power, on the application of the superior, to remove the vassal from the possession. The superior raises an action in ordinary form, setting forth that the subjects are of the value which makes the action competent, and that the feu-duty has run in arrear for two years, and concluding that the vassal be removed from his possession, and that warrant to that effect be granted. The action proceeds in the ordinary form. When the defender fails to appear decree is pronounced. If he does appear, a record is made up; and then, upon such evidence as the Sheriff may require as to the value of the subjects, and as to the feu-duty being in arrear, decree may be given. Where the defender objects to the pursuer's title, the Sheriff cannot entertain the objection, unless it be such that its grounds are instantly verified by the superior's titles. If the objection be not of this kind, it is to be disregarded in the Sheriff-Court and made good in an action of declarator in the Court of Session, which the defender is at liberty to bring at any time within a year from the date of removal.

When decree of removal is pronounced, it must be executed at the first term of Whitsunday or Martinmas which occurs four months after it has been issued by the Sheriff.(g) It is declared to have the effect of the old decree *ob non solutum canonem*, and the vassal can purge the irritancy (by paying the arrears and expenses) at any time before the execution of the warrant.(h)

(g) Whether this means from the date of the decree or from the date of the extract is not clear.

(h) 16 and 17 Vict. c. 80, § 82 (App. lxxxiv).

Interdicts.

Section XI.—INTERDICTS.

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| 1. <i>Nature of Remedy.</i> | 5. <i>Proceedings in Interdict Process.</i> |
| 2. <i>Form of Application.</i> | 6. <i>Competency of applying to Two Courts.</i> |
| 3. <i>Interim Interdict.</i> | 7. <i>Breach of Interdict.</i> |
| 4. <i>Caveat against Interim Interdict.</i> | |

1. **Nature of Remedy.**—In the process of interdict a Court is asked to prohibit a person from doing, or continuing to do some particular act. The Act complained of must be illegal or wrongful, and the complainer must have a title and interest to object to it; but beyond these requisites there is scarcely a limit to the kind of act against which interdict may be granted. The act must be one of which the pursuer has reasonable ground to suspect or fear the committal ;(i) and there must be proof of wrong done, or intended, before permanent interdict will be granted ;(k) although an interim interdict may be more easily given. As the remedy is one which consists in prohibiting, it is evidently inappropriate where the legal act complained of is completed, and is not of a kind which admits of repetition. For instance, it is too late to ask for interdict against building on a piece of ground after the house has been half built.(l) In such cases there is always a remedy by declarator, or removing, or ejection, or petition for a re-delivery, as the case may be, but it is evidently absurd to ask a Court to prohibit what has happened.

2. **Form of Application.**—The process of interdict is a summary process commencing by petition. The grounds on which the interdict is asked are set forth on principles the same as those on which the grounds of action are stated in the summons. The remedy craved is specified in the prayer; and the act or acts which the Court is asked to prohibit must be set

(i) *Moncreiff v. Arnott*, 13 Feb. 1828, 6 S. 530; *Weir v. Glenney*, 7 April 1834, 7 W. and S. 244.

(k) *King v. Hamilton*, 17 Jan. 1844, 6 D. 399.

(l) *Lowson v. Cramond*, 16 Nov. 1864, 8 Macph. 53; see also *Glen v. Caledonian Railway*, 23 May 1868, 6 Macph.

797.

Interim Interdict.

forth distinctly. This is essential, for the party involved must be put in a position to be able to know what he may do without fear of contravening the order, and what acts will bring him under the penalties of breach of interdict.(m) The petition always concludes specially for interim interdict, though it would seem competent to give it without a special prayer for it.(n) The petition may contain a conclusion for damages.(o)

It is not usual, though it is difficult to see why it should not be competent, to bring a summons with no conclusion except one for interdict; but in actions with other conclusions, one for interdict is frequently introduced.

On the petition being presented, an order for service is pronounced. This directs a copy to be served on the defender, and allows him a certain number of days to enter appearance. This order may also dispose of the question of interim interdict.

3. Interim Interdict.—The use of interim interdict is to preserve matters intact until the rights of the parties are determined. It is often granted till parties are heard, on consideration merely of the statements in the petition, as it is sometimes necessary to act on the moment; but it should not be granted without due regard to the consequences both of granting and of refusing. Sometimes it is not granted except on caution for damages; and sometimes it is refused if caution be found by the opposite party.(p) When granted before the defender has appeared, he can, on entering appearance, move to have it recalled; and, indeed, unless the interlocutor be specially worded, it is liable to recall at any moment.

If the Sheriff-Substitute grants, or refuses to grant, interim interdict, the interlocutor may be reviewed by the principal She-

(m) *Cathcart v. Sloss*, 22 Nov. 1864, 3 Macph. 76.

(n) A. S. 10 July 1839, § 137 (App. lxiv).

(o) *Ib.* § 138.

(p) This is matter of common practice. See, *inter alia*, *Curtis v. Sandiam*,

29 Nov. 1831, 10 S. 72, where interdict was granted on the pursuer finding caution; and *Johnston v. Dumfries Road Trs.*, 19 July 1867, 5 Macph. 1127, where it was refused on the defender finding it.

Interdicts.

riff.(q) When interim interdict, granted by the Sheriff-Substitute, has been recalled by him, an appeal against the interlocutor recalling has not the effect of continuing the interdict, for the process is in the same position as if interim interdict had never been granted.(r)

Under the old forms, though a process fell asleep, an interim interdict remained effectual;(s) but under the new forms, if a process stood dismissed under the Act of 1853 for failure to take proceedings, an interim interdict granted would be held to fall with the action.

4. **Caveat against Interim Interdict.**—When a party has reason to fear that another is to apply for interdict against him, he can enter (with the Sheriff-clerk) a “caveat,” and this will ensure him notice of the presentation of the petition, and an opportunity of being heard, before interim interdict is granted. He must be prepared, however, to discuss the question immediately on receiving the notice, because he is not entitled to time.

5. **Proceedings in Interdict Process.**—Except as regards the matter of interim interdict, the process of interdict is conducted in the ordinary style of a process commencing by petition.

6. **Competency of applying to Two Courts.**—It has happened that parties have presented petitions for interdict both to the Court of Session and to the Judge Ordinary; but in such an event there can be little doubt that the second application is incompetent—if both are not—for there is no authority for holding that the ordinary rules as to *lis alibi pendens* do not apply to interdict as well as to other processes. In a case where interim interdict was refused in the Sheriff-Court, and

(q) *Argyle v. McArthur*, 28 June 1861, 23 D. 1236.

(s) *Hamilton v. Allan* (Court of Session case), 16 Feb. 1861, 23 D. 589.

(r) *Laird v. Miln*, 16 Nov. 1833, 12 S. 54.

Breach of Interdict.

the pursuer (without abandoning the proceedings there) brought a process of interdict in the Court of Session, Lords Deas and Ardmillan thought it incompetent; and though the other two Judges of the First Division decided the case on the relevancy, they suggested no opposite opinion on this point.(t)

7. *Breach of Interdict.*—The remedy given by an interdict being a negative one, the holder of the decree cannot enforce it—except as to the expenses—by imprisonment, as if it were a decree *ad factum præstandum*. If the defender transgress the order, the pursuer's remedy is to prosecute for breach of interdict. This is done by a summary petition, in which the pursuer can conclude to have matters restored as they were,—to have the defender found liable in damages,—to have him made to find caution not to repeat the offence,(u)—to have him fined for contempt of Court,—and imprisoned if he fail to pay the fine,—and to have him found liable in expenses. If the petition contains a prayer for fine or imprisonment, it comes to have somewhat of the character of a criminal prosecution; the concurrence of the procurator-fiscal is required;(v) and it seems that the defender must be present at the time of pronouncing sentence.(x) The defender may, however, be judicially examined,(y) though it would be unsafe to examine him as a witness.(z) The pursuer must prove the breach of the interdict; and, as the consequences are serious, great exactness is required, the interdict being strictly construed. An interdict against drawing boats upon an island was not held to be infringed by the defender drawing his boat till it grounded in the shallow

(t) See *Cathcart v. Sloss*, *supra*, note (m).

(u) See *Gray v. Petrie*, 17 Feb. 1848, 10 D. 718, for an example of caution being ordered.

(v) *Northumberland v. Harris*, 23 Feb. 1832, 10 S. 366.

(z) See authorities cited in *Anderson v. Connacher*, 20 Dec. 1850, 13 D. 405.

The defender is not required where he is merely found liable in expenses.

(y) *Mackay v. Ross*, 23 Sept. 1853, 1 Irv. 288. The case of *Duncan v. Ramsay*, 15 April 1853, 1 Irv. 208, proceeded on specialties.

(x) Compare *Dickson on Evidence*, § 1707.

 Lawburrows.

water on the shore.(a) The penalty in a breach of interdict is in the discretion of the Court, and the fine varies, according to the circumstances, from a nominal fine to one of large amount.(b) It is made payable to the public prosecutor, and he may recover it by the method in use for civil decrees;(c) or, if the sentence contain authority to that effect, may imprison the defender, for the time specified, in case of non-payment.

 Section XII.—LAWBURROWS.

Lawburrows is an old form of process, still in use, by which a person who dreads bodily harm from another obliges the other to find caution not to trouble him.

The mode of application is by a petition setting forth (in substance) the fear which the applicant entertains, and concluding that the defender be bound to find caution for a specified sum not to molest the pursuer, and that, if he fail to find caution, he be put in prison. The sum for which caution has to be found is specified in one(d) of the many old statutes authorising the process, for different classes of persons; but as the penalties fixed are now inadequate, the Sheriff exercises the power, on application, of making the penalty larger. After presenting the petition the applicant appears before the Sheriff and swears to its truth. Upon this, in the ordinary case, the order to find caution is at once issued; but in cases between husband and wife,(e) or parent and child,(g) the applicant must bring some evidence

(a) *Menzies v. Macdonald*, 13 Feb. 1864, 2 Macph. 652.

(b) *Caledonian Railway v. Hamilton*, 3 Aug. 1850, 7 Bell's Ap. Ca. 272.

(c) *Beattie v. Rodger*, 14 Nov. 1835, 14 S. 6.

(d) 1593, c. 170. For an earl or lord the penalty is £2000 Scots; for a great baron, £1000 Scots; for a freeholder, 1000 merks; for a feuar, 500 merks; for a yeoman, 100 merks; for a landless gen-

tleman, 200 merks; for every person summoned to an assize, 100 merks. The other statutes will be found in the Scots Acts, voce "Lawburrows."

(e) *Thomson*, 7 March 1815, F.C.; *Calder*, 24 Feb. 1841, 3 D. 615.

(g) *Taylor*, 25 June 1829, 7 S. 794. The farther evidence in these cases seems to have been produced in the form of precognitions taken before a magistrate.

Lawburrows.

that he has cause to dread bodily harm. The order fixes the amount of caution to be found, and allows a certain short time for the defender to find it. The service of this notice by an officer of Court is the first which the defender usually knows of the proceeding. If he fail to find caution within the period allowed, he can be imprisoned under the warrant until he does find it. The debt being a civil one, the pursuer would probably have to aliment the prisoner while in prison.

If the warrant has been improperly obtained, the defender must apply to the Court of Session for redress, and this he does by presenting a note of suspension if he has not been imprisoned, and one of suspension and liberation if he is in prison.^(h) This note may be passed (so as to try the question) on such caution as the Court think fit, there being no rule on the subject. Where the defender offers to prove that the application was made maliciously and without probable cause, the Court may dispense with any caution.⁽ⁱ⁾ What it is necessary to show, before the warrant will be quashed, appears to be a good deal. In the most recent case in the Court of Session it was held by the Lord Ordinary, and acquiesced in, that the warrant could not be set aside unless the defender proved that the application was made both maliciously and without any probable cause.^(k) This makes the power of setting aside the warrant almost useless, because malice is very difficult to prove, and it may be doubted whether the decision did not proceed on stricter views than the policy of the various statutes required. Under the statutes it is, doubtless, imperative to issue the warrant in the ordinary case upon the oath, and it is almost essential to do so if the statutes are to be carried out, because, if time were given, the evil to be prevented might be done; but it does not follow that after caution has been found, and inquiry can calmly be made, the obligation to find caution should be continued in

(h) *Smith v. Baird*, 26 Jan. 1799, M. 8043.

(k) *Randall v. Johnston*, 28 June 1868, 40 Jurist, 554.

(i) *Gadois v. Baird*, June 1856, 28 Jurist, 682.

Regulation of March Fences.

perpetuity, though it be shown that the alarm was groundless. When it is proved that the warrant is illegally taken out, the pursuer is liable in damages.

Section XIII.—PROCEEDINGS UNDER LUNACY ACTS.

Under the Lunacy Acts the Sheriff grants the warrants necessary for the commitment of lunatics to asylums, but those proceedings are entirely statutory, and it would be a mere repetition to give here more than a reference to the statutes 20 and 21 Vict. c. 71, and 29 and 30 Vict. c. 51, under which they are chiefly regulated. The forms of application, which give every necessary information, are printed by the Lunacy Board, and can in general be obtained from any of the Inspectors of the Poor.

Section XIV.—REGULATION OF MARCH FENCES.

The regulation of march fences belongs to the Judge Ordinary. If there be no fence between conterminous proprietors, the Sheriff may, on the application of either of them, appoint a suitable fence to be erected at their joint expense; and if the old boundary be irregular, the Sheriff has power to straighten the march by taking, as far as may be, equal portions from each property and adding them to the other.^(l) Where the lands are entailed, their exchange must be fortified by an excambion under the Montgomery Act.^(m)

The regulation as to building and repairing fences is applied only to lands suitable for being inclosed, and not to extensive moor lands. To prevent hardship, it is also not applied to lands of less than five or six acres in extent. The regulation as to the straightening of a march cannot be carried out if there is a dispute as to the existing line. In that case the

^(l) 1661, c. 41 (ratified by 1685, c. 39),
and 1669, c. 17.

^(m) *Supra*, Sect. VIII, art. 4.

Maritime Cases.

process must be sisted till the dispute be settled by declarator in the Court of Session; and then, when the actual boundary is ascertained, the Sheriff may proceed to adjust it.(n)

Processes for the regulation of fences commence by petition, and are conducted in the ordinary manner, the only peculiarity being, that in straightening marches the Sheriff is required by the Act 1669, c. 17, to visit and inspect the ground.

Section XV.—MARITIME CASES.

All maritime cases(o) arising within the district, and in the navigable rivers, ports, harbours, creeks, shores, and anchoring grounds belonging to it, may be brought before the Sheriff.(p) The jurisdiction extends over foreigners and persons residing out of Scotland, provided the defender, on any legal ground of jurisdiction, is amenable to the jurisdiction of the Sheriff before whom the cause may be raised. This is held to cover the power of founding jurisdiction against foreigners by arrestment *jurisdictionis fundandæ causa*.(q)

For causes not exceeding the value of £25, the jurisdiction is privative. When counties are separated by a river, firth, or estuary, the Sheriff of each county has jurisdiction over the whole intervening space occupied by water; but in civil causes, if the defender reside in either of the counties, the cause must be brought in the county where he lives. There is a power in maritime cases of remitting causes from one Sheriff-Court to another *ob contingentiam*, or for other sufficient reason. In all other respects maritime causes are conducted like ordinary actions.(r)

(n) See *Strang v. Stewart*, 31 March 1864, 2 Macph. 1015; affd. 15 Feb. 1866, 4 Macph. (H. L.) 5; Bell's Principles, 4th ed. § 959.

(o) Maritime causes comprehend "questions of charter-parties, freights, salvages, wrecks, bottomries, policies of insurance, and, in general, all contracts concerning the loading or unloading of ships, . . .

and all actions for the delivery of goods sent on shipboard, or for recovering their value;" Ersk. 1, 3, 33.

(p) 11 Geo. IV and 1 Will. IV, c. 69 (App. i).

(q) *Bruhn v. Grunwaldt*, 20 Jan. 1864, 2 Macph. 835.

(r) A. S. 10 July 1839, § 161 (App. lxvii).

Action of Maills and Duties.

Section XVI.—ACTION OF MAILLS AND DUTIES.

An action for the payment of rents used to be called an action of maills and duties. The action is an ordinary one, commencing by summons. If the pursuer be in possession of the estate, whether as proprietor, or as adjudger, or under any title which by law gives him the rents, the action is directed against the tenants only; but where the person entitled to the rents is not legally in possession, he must call the person who is in such possession as defender, as well as the tenants. Should a question of heritable title arise, the action must be sisted; but tenants cannot object to the title of the person from whom they derive their right, or to that of his heir, provided either were infeft. If a third party appear in the process, having also an infeftment, the pursuer must prove that he, or his author, has been in possession of the rents for seven years immediately preceding.(s)

The action sets forth the pursuer's title, and the names and designations of the tenants, with their respective tenures, and concludes for payment of the rents. It may conclude not only for the arrears, but for rent due at a coming term, that term being first come and bygone.(t)

Section XVII.—PROCEEDINGS BETWEEN MASTER AND SERVANT.

Most of the proceedings between master and servant, being actions founded on contract, are actions of the ordinary kind; but there is a peculiar provision for the enforcement of the contract of service, under the penalty of summary imprisonment, which requires special notice. This proceeding is not taken under the Master and Servant Act 1867(u) (which regulates most of the *quasi* penal proceedings between master and servant), but is a proceeding at common law.

(s) Hunter on Landlord and Tenant, 3d ed., vol. ii, p. 334.

(t) *Woodward v. Wilson*, 10 March 1829, 7 S. 566.

(u) 30 and 31 Vict. c. 141.

 Proceedings between Master and Servant.

When a servant deserts his service, it is competent to apply to the Sheriff for a warrant ordaining him to return to his service, and to find caution to remain there till the end of his engagement, under the penalty of imprisonment until the fulfilment of the warrant. The power applies to the case of a workman leaving before he gives the period of notice required in his employment ;(v) or of a workman leaving before the time which he has engaged to serve ;(x) or of an apprentice leaving before the expiry of his apprenticeship.(y) The warrant, however, can be granted only to make the workman return and serve out the period of his service ; it cannot be granted in general terms to make him fulfil his engagement, because he may have engaged to do other things besides serving in the manner to which his situation binds him, and such other stipulations cannot be enforced in this way.(z) Further, the warrant is applicable only to the case of desertion of service. In the case of a servant failing to enter after engaging, it is competent to present a petition to have him ordained to enter the service, and to find caution to remain there, but such a petition is conducted and enforced in the same way as any other petition *ad factum præstandum*.(a)

The petition sets forth the contract of service and the date of desertion ; and the prayer asks the Sheriff (on the complaint being admitted or proved) to ordain the servant to return, and to grant warrant to imprison him till he find caution to return and continue in service till the end of his engagement. Usually the first step (when prayed for in the application) is to grant a warrant to apprehend the defender and bring him up

(v) *Reid v. Raeburn*, 4 June 1824 ; 3 S. 104 ; *Hamilton v. Outram*, 5 June 1855, 17 D. 798.

(x) *Gentle v. M'Lellan*, 9 July 1825, 4 S. 162.

(y) *Cameron v. Murray*, 8 Mar. 1866, 4 Macph. 547.

(z) *Stewart v. Stewart*, 21 May 1833, 11 S. 628 ; *Wright v. M'Gregor*, 28 June 1857, 2 S. 855.

(a) *Fulk v. Anderson*, 1 June 1843, 5 D. 1096. The caution here was asked only as to entering the service, but apparently this was a mistake, because, throughout the discussion, the case was treated as if the servant had been asked to find caution to enter and remain in the service.

Meditatio Fugæ Warrants.

for examination; but it is also competent to proceed by serving the complaint in the usual manner. When the defender is brought up for examination, if he admits the engagement and desertion, the warrant to imprison may be granted. If he deny either of those things, both parties are allowed a proof, and the defender may be liberated, with or without caution to abide the issue of the farther proceedings, as the Sheriff may think fit. At the proof, the evidence should be taken in the usual manner, and the Sheriff give his decision at once. When the complaint is served, it is competent to put in the order for service a certification that if the defender do not appear the warrant to imprison will be granted, and on his failing to appear it may be granted accordingly. If he appear after service, the case should be conducted in the same way as if he had been apprehended. When the warrant is granted, it is not usual to give any time to find the caution, as that might defeat the object. The sufficiency of the caution is entirely in the Sheriff's discretion, and he may limit the amount in any manner, or even, in case of hardship, accept the servant's own bond. The whole proceedings are summary, and if the Sheriff grants the warrant erroneously, the redress is by suspension in the Court of Session.^(b)

Section XVIII.—*MEDITATIO FUGÆ.*

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|---|---|
| 1. <i>Debt on which Warrant Competent.</i> | 5. <i>Oath of the Creditor.</i> |
| 2. <i>What Persons may be Apprehended.</i> | 6. <i>Granting Warrant of Apprehension.</i> |
| 3. <i>What Sheriff may issue the Warrant.</i> | 7. <i>Examination of the Debtor.</i> |
| 4. <i>Form of Application.</i> | 8. <i>Proof.</i> |
| | 9. <i>Order to find Caution.</i> |

The *Meditatio Fugæ* Warrant is issued on the application of a creditor, who swears to the verity of his debt, and also to his belief that the debtor means to leave Scotland; specifying in his oath such circumstances as afford reasonable ground for

(b) See *Cameron v. Murray*, *ut supra*, where all the authorities were examined and the proceedings fully discussed.

Debt on which Warrant Competent.

justification of that belief. Under this warrant the debtor is immediately apprehended and brought before the judge; who, after an examination into the circumstances, either liberates him as one against whom there is no just ground of suspicion, or authorises his imprisonment till he shall find security to appear in an action to be raised against him within a certain time, usually six months; or,* if there be diligence subsisting against him, to abide the course of it.(c)

1. Debt on which Warrant Competent.—It is not necessary that the debt be exigible at the time, or even that it have been proved to be due. It may be a debt, future, contingent, or unconstituted. Thus, it was held competent to apprehend an absconding tenant till he found caution not only to meet an action for arrears and current rent, but to meet actions (should it be necessary to raise them) for the rent of all the years of his lease yet to come.(d) A common case of the use of the warrant shows well the kind of debt for which it is issuable. A woman pregnant with an illegitimate child can have the alleged father, should he be leaving Scotland, apprehended till he find caution to meet an action for the inlying expenses and aliment.(e) In this case the debt has every possible element of uncertainty about it. The debt must be one of the nature and amount for which a debtor can be imprisoned.(g)

2. What Persons may be Apprehended.—The warrant is usually used against domiciled Scotchmen about to leave Scotland; and it does not appear that the fact of the debtor having abundance of property, real or personal, to meet the claim, is ground for making an exception.(h) If a person, after contracting debt, leaves Scotland, but returns for any purpose, he is liable to the use of the warrant.(i)

(c) From 2 Bell's Com. 559.

(d) *M'Gill v. Ferrier*, 9 March 1838, 16. S. 934.

(e) *Davies v. Duncan*, 9 Feb. 1861, 23 D. 532.

(g) *Marshall v. Dobson*, 18 Dec. 1844, 7 D. 232.

(h) *Heron v. Dickson*, 16 Dec. 1773, M. 8550.

(i) *Crowder v. Watson*, 16 Aug. 1832 6 W. and S. 271.

Meditatio Fugæ Warrants.

Foreigners while in Scotland are liable to the diligence if they contract debt here ;(*k*) and if a foreign debtor be found in Scotland absconding from his foreign creditors, they may make use of the diligence to stop his further flight.(*l*)

Persons who, in the course of their employment in the public service, are ordered abroad on duty, cannot be stopped by this diligence.(*m*) As all who contract with such persons know their liability to such orders, and need not give credit to them unless they please, it would be unreasonable, on their account, to allow any interference with the public service.

The intention of the debtor must be to leave Scotland; it is not enough that he be going from one part of it to another.(*n*) It is not necessary that his object in leaving should be to escape payment of the debt; it is enough that it will have the effect of removing him from the jurisdiction of the Scottish Courts.(*o*) But it must be a removal of a kind that will have such effect, for if the absence is, *bona fide*, to be a temporary one, whether for business or pleasure, there is no reason for making any extraordinary interference with the debtor's personal liberty.(*p*)

3. What Sheriff may issue the Warrant.—It is not necessary that the warrant should be issued by the Court which is to try the cause; it is an act of magisterial duty which should be performed by the Judge Ordinary of the jurisdiction within which the debtor is found.(*q*) The Sheriff of the county in which the defender resides has also jurisdiction, and that although the defender may not be in it at the time. If the action be in dependence, the Judge before whom it is being tried should

(*k*) Ersk. 1, 2, 21.

(*l*) *Ray v. Bellamy*, 21 June 1763, M. 2051; 2 Bell's Com. 563.

(*m*) *Service v. Hamilton*, 25 May 1811, 2 Bell's Com. 5th ed. 563; *Bryson*, 10 March 1812, F.C.

(*n*) *Laing v. Watson*, 20 Dec. 1789, M. 8555. "Retiring to the sanctuary" was not held to justify the warrant, as there was a prison in Holyrood to

keep the debtor from leaving the country if he showed any tendency towards that; *Place v. Donnison*, 2 July 1814, F.C.

(*o*) *Jackson v. Smellie*, 22 Nov. 1865, 4 Macph. 72.

(*p*) See *Gorman v. Hedderwick*, 8 Feb. 1827, 5 S. 291.

(*q*) 2 Bell's Com. 559, founding on *Barrowfield v. Weatherspoon*, June 1727, M. 8549.

 Form of Application—Oath of the Creditor.

have a like jurisdiction. Where an application was made to a Sheriff within whose jurisdiction the debtor neither resided nor was at the time, but where he was expected to come, and where, on coming, he was apprehended on the warrant prepared for him, the jurisdiction was questioned, but apparently without sufficient reason, for the debtor was within the jurisdiction at the time of executing the warrant, which began the process in so far as he was a party to it.(r)

4. Form of Application.—The petition sets forth the debt which is due or claimed; and it should do this in a specific form. For instance, if the debt be one consisting of damages due, the petition should set forth the act or acts for which they are claimed as well as their amount;(s) but if the nature of the debt be set forth in the petition so as to leave no doubt as to what is claimed and as to the competency of issuing a warrant for the claim, the precise amount due may be stated afterwards in the course of the proceedings.(t)

The petition also sets forth the purpose of the debtor to abscond.

5. Oath of the Creditor.—After presenting the petition the creditor appears before the Sheriff, and depones to the verity of the debt, and to the intention of the debtor to abscond. The oath to the verity is in general terms that the debt is due; but it is essential.(u) In giving his oath as to the debtor's intention to abscond, the creditor must detail the grounds on which he founds his belief, and these must be recorded.(v) If the creditor at the time of making the application be not within

(r) *Mantle v. Miller*, 13 Dec. 1855 (reported 31 Jan. 1856), 18 D. 395.

(s) *Campbell v. Robertson*, 20 Nov. 1847, 10 D. 125. In this case doubts were thrown out whether a claim for damages, especially for slander, could be made a ground for granting the warrant.

(t) *Davies v. Duncan*, *supra*, note (e).

The petition stated the claim to be for in-lying expenses and aliment to a child; and the amounts claimed were stated afterwards in a minute.

(u) *King v. Hunter*, 18 May 1882, 10 S. 544.

(v) 2 Bell's Com., 5th ed., 560; *Laing v. Watson*, 20 Dec. 1789, M. 8555.

Meditatio Fugæ Warrants.

the jurisdiction, he may take this oath before any magistrate in the form of an affidavit, as time would be lost if it were held necessary to take it under a commission. When an affidavit is given, there is a custom of making the agent of a creditor residing in Scotland, or the mandatory of a creditor not residing in Scotland, take a second oath to the effect that he believes the first to be true.(w) Wherever practicable, the oath should be taken before the Sheriff who is to grant the warrant, for a Sheriff who trusts any part of the duties to others in a matter of this kind, may incur responsibilities.(x)

6. **Warrant of Apprehension.**—If the circumstances set forth in the creditor's oath are, if true, sufficient to show that the debtor is about to leave the country, the Sheriff may issue the warrant to apprehend the debtor and bring him before him for examination. This warrant may be executed beyond the county, provided that the officer executing it be either a messenger-at-arms or an officer of the county from which it is issued.(y) If the warrant is to be executed in another county by an officer of that county, a warrant of concurrence must be obtained from its Sheriff.

The warrant may be executed on a Sunday.(z)

7. **Examination of the Debtor.**—On the debtor being brought before the Sheriff he is examined as to the debt and as to the intention to abscond.(a) With regard to the debt, it is not very material what he says. The important part of the examination is as to the absconding. If he admits that intention, or facts which sufficiently prove it, he may be at once ordered

(w) See Bell's Com. *ut supra*. The proceeding is unintelligible. If the law desire to make the agent or mandatory responsible for the good faith or truth of the affidavit it should say so at once.

(x) See *Anderson v. Smith*, 26 Nov. 1814, F. C., where it was much doubted

whether a magistrate could act on an examination taken by his clerk on a remit.

(y) 1 and 2 Vict. c. 119, § 25 (App. xxviii).

(z) *Blair v. Simpson*, 6 July 1821, 1 S. 107.

(a) *Service v. Hamilton*, 25 May 1811 *supra*, note (m).

Proof—Order to find Caution.

to find caution *de judicio sisti*. If he deny the intention, then the Sheriff will have to consider, in the whole circumstances, whether the debtor ought to be set free unconditionally, or whether he ought to be liberated only on caution to await the results of the proceedings.

The examination is dictated to the sheriff-clerk and is taken down—except that it is not on oath—in the same way as the deposition of a witness taken on commission.

8. Proof.—When the intention to abscond is denied, a proof is allowed, and it proceeds at once, without any other record than the petition and oath on the one side, and the declaration on the other. The petitioner begins the proof, as the burden of proving the intention of the debtor to abscond lies with him. Proof in regard to the debt is not taken. The utmost despatch is given, the proof being generally taken on the day of the examination, or the day after it.

9. Order to find Caution.—On the intention to abscond being admitted or proved, the debtor is ordered to find caution *de judicio sisti*; or, if it be diligence that he is avoiding, caution to abide its issue. The caution to meet the action is coupled with the condition that the action be brought within a specified time, usually six months. If the debtor cannot find the caution he is committed to prison, and must remain there until the action is settled, provided it be brought within the specified time. So long a period as six months for bringing the action should not be allowed unless it be necessary, because the Court has held that when it is allowed, the debtor cannot object to the creditor taking the full period, though there may be no occasion for it.^(b) When the action is brought it seems that the judge has the control over the debtor's custody, and may liberate him on such terms as he finds reasonable.

When caution is found, the cautioners must be sufficient in the opinion of the sheriff-clerk to meet the penalty which will

(b) See case cited, note (p).

 Process of Multiplepoinding.

be due if the bond be forfeited. The bond obliges the cautioners to produce the debtor at any time during the progress of the action on getting reasonable notice. The creditor's right to call for the debtor ends on process being extracted. When the right is exercised, and the debtor appears, it is then for the Court to make such orders to prevent his absconding as may be reasonable. If the debtor be not produced, the bond is forfeited, and the penalty is having to pay everything that is due in the action.(c)

 Section XIX.—PROCESS OF MULTIPLEPOINDING.

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| 1. <i>Competency of Action.</i>
2. <i>Proceedings in Multiplepoinding.</i>
3. <i>Ascertaining the fund in medio.</i>
4. <i>Order for Claims.</i> | 5. <i>Record and Disposal of the Claims.</i>
6. <i>Late Appearance of Claimants.</i> |
|---|---|

1. *Competency of Action.*—When two or more persons are claiming from another something which he holds in his possession, the process by which the right to the thing, or to a share of it, may be determined, is called a multiplepoinding. The thing in dispute may consist either of money or of goods; or it may be a deed, but in the Sheriff-Court it cannot be an heritable subject. As it commonly consists of money, it is called the *fund in medio*, whatever its exact nature may be. The essence of the action is, that the holder be subjected to at least two claims; that is, that there be what is called double distress. A claim of the nature of a debt upon the fund (that is, a claim which goes to diminish the fund and not to demand a share of it), where the holder is competent and willing to dispute the claim, does not give rise to the kind of distress which authorises a multiplepoinding, because there the claim can be settled in an ordinary action at the instance of the claimant against the holder.(d) But even a claim of debt on the fund

(c) *Muir v. Collett*, 23 Nov. 1866, 5 Macph. 47.

(d) *Crokat v. Panmure*, 8 June 1853, 15 D. 787.

Proceedings in Multiplepointing—Ascertaining the Fund *in medio*.

may make a multiplepointing competent, if the claimant will not raise his action so as to have the question settled, and the holder is thus impeded in paying over the fund to those whom he considers to have right to it.(e) The action of multiplepointing is one for the actual division of funds requiring to be immediately paid over. It is not meant for the settlement of questions of right which do not require to be carried into effect till a future date. Thus, a multiplepointing is not a competent process for settling how a fund is to be divided at the death of a liferenter who is still in life.(g)

2. Proceedings in Multiplepointing.—The summons of multiplepointing may be raised either by the holder of the fund or by one of the claimants; and, as the holder stands as nominal pursuer in all cases, the body of the summons must always tell who the real raiser is.(h) The defenders are the different claimants, so far as known to the raiser. If the pursuer be only nominally the raiser, the summons must be served on him also.(i) The summons specifies the amount or nature of the fund *in medio*, and asks that the pursuer shall be declared to be only liable in single payment to those having right, and concludes that the defenders shall produce their claims, and the pursuer be decerned to pay the fund—deducting his expenses of process—in such way as may be just, and that such of the defenders as have no right be prohibited from troubling him in future.(k)

Appearance is entered in the usual way, but claimants on the fund may appear though not summoned.

3. Ascertaining the Fund *in medio*.—On the cause being called, the first matter to be discussed is the existence and

(e) *Blair's Trustees v. Blair*, 12 Dec. 1863, 2 Macph. 285.

(g) *Nimmo v. Murray*, 14 May 1863, 1 Macph. 792.

(h) 16 and 17 Vict. c. 80, § 8 (App. lxxiv).

(i) A. S. 10 July 1839, § 102 (App. lix).

(k) 16 and 17 Vict. c. 80, Sch. (A) (App. xci).

Process of Multiplepointing.

amount of the fund *in medio*. If the pursuer admits having it, and the defenders are satisfied with his statement of its amount, there will be no litigation on this point; but if these things be in dispute, a record must be made up; and, in general, it will be necessary to order a condescendence (called, in this case, of the fund *in medio*) to be given in by the real or nominal raiser, and to allow the other parties to lodge defences. On this record the questions as to the fund *in medio* will be determined as in an ordinary action.

4. Order for Claims.—On its being admitted or established that there is a fund *in medio*, the next step is to find the pursuer liable only in single payment, and to order claims to be given in within a certain short space.^(l) When the holder has no claim over the fund he is frequently ordered to consign it at this stage; and if he does consign it, a decree exonerating him is pronounced. If there be any doubt that all the claimants are in the field, it is common at this time to advertise for claims.

5. Record and Disposal of the Claims.—Any number of claimants claiming on the same grounds may state their claims on the same paper. The claim is called, technically, a condescendence and claim, and sets forth the grounds of the demand in the same way as in an ordinary condescendence. Pleas in law are added as usual, and then in a "claim" is stated the claimant's precise demand, much as he would state it in a conclusion of a summons. When the time for lodging claims expires the Sheriff appoints the parties to meet him, and allows each to adjust his own claim and to meet the averments of his opponents in so far as necessary. On this being done, the record is closed.⁽ⁿ⁾ Among the parties to it this has the same effect as the closing in an ordinary action,^(o) and it is incompetent to

(l) 16 and 17 Vict. c. 80, § 8; *Connell v. Ferguson*, 6 March 1861, 23 D. 683. (o) *Stevenson v. Dumbreck*, 18 Feb. 1856, 19 D. 462.
(n) 16 and 17 Vict. c. 80, § 8.

Late Appearance of Claimants.

amend a claim.(p) After the claims are lodged the Sheriff sometimes appoints a common agent where the interests of a number of claimants are or ought to be the same. This proceeding is provided for by the Act of Sederunt of 1839, but it is not much used now.(q)

When the record of claims has been closed, their discussion and decision proceeds as in an ordinary action; and when a decision is pronounced in favour of any one of the claimants, those to whose interest it is adverse may appeal.

6. Late Appearance of Claimants.—An important feature in multiplepointings is, that claimants may appear at any stage. Even when they know of the proceedings—indeed, even when they have been called as defenders—the only penalty on not appearing till at a late stage is to exact payment of such expenses as the Court thinks reasonable.(r) If, however, they do not appear till decree of preference has been or is about to be pronounced, they may not be admitted, and their only mode of protecting their interests will be by declarator.(s) The power of appearing late, however, does not entitle a party to re-appear who has appeared and lodged a claim but has neglected to go on with it. Such a party would be in the position of a defender who has lodged defences in an ordinary action; and he would be held bound by any decision pronounced in the case, subject to the discretion of the Court to repon him against it, in the same way as a defender in an ordinary action might be reponed against a decree by default.

Section XX.—POINTING OF THE GROUND.

Pointing of the ground is a diligence, or action of execution, by which a creditor whose debt is heritably secured at-

(p) *Graham's Trustees v. Graham*, 26 May 1868, 6 Macph. 820.

(q) A. S. 10 July 1839, § 104 (App. lix).

(r) *Jaffe v. Carruther*, 8 March 1860, 22 D. 936.

(s) *Morgan v. Morris*, 11 March 1856, 18 D. 797.

 Poinding of the Ground.

taches the effects on the heritage, so as to make them available in payment of principal or interest, or arrears of interest. The debt may be such a debt as is due by a feuar to his superior for feu-duties or casualties, or as is contained in an ordinary heritable bond. But, though the debt must be heritable, the immediate creditor's title to it need not itself be heritably completed; his title may be only personal, as that of an assignee to an heritable bond, or that of an executor to arrears of interest or feu-duties. The creditor must not be in actual legal possession of the heritage, because in that case he would be in the same position as if he were proprietor, and would have to proceed against the tenants by the action of mailles and duties; and, in regard to moveables left on the ground by the debtor whom he has put out of possession, it would seem that they are secured to him without further diligence. By poinding the ground, goods of tenants are secured only to the extent of rents unpaid by them.(t)

The summons concludes for warrant (1) to poind the goods or other moveables on the ground, under the restriction that goods of tenants or occupants shall not be taken to the value of more than the rent or other prestations due by them; and (2) to apprise the ground right and property to the value of the remainder, to the effect of extinguishing the right of the debtor or vassal, but redeemably.(u) The title of the pursuer is set forth, and the defenders called are the proprietor and the tenants or occupants of the land. When the action is defended a record is made up in the usual way; but if the pursuer's right is *ex facie* good, the Sheriff cannot entertain objections to it founded on questions of heritable title.(v) On decree being pronounced, the extract is a sufficient warrant to poind, without other precept or authority, and no charge is requisite.(x) The poinding in other respects proceeds in the usual way.

(t) *Campbell's Tra. v. Paul*, 13 Jan. 1835, 13 S. 287; and *Brown v. Scott*, 21 Dec. 1859, 22 D. 278.

(u) 1 Bell's Com. (5th ed.), p. 688.

(v) *Ailsa v. Jeffray*, 15 Feb. 1859, 21 D. 492. Lord Deas' opinion in this case

will be found to contain a valuable exposition of the law as it at present stands.

(x) *Kennedy v. Busk*, 17 Feb. 1852, 14 D. 513. Lord Medwyn's opinion contains a full exposition of the mode of enforcing the decree.

Proceedings under the Poor Law Act.

Section XXI.—PROCEEDINGS UNDER THE POOR LAW ACT.

Under section 73 of the "Act for the Amendment of the Laws relating to the Relief of the Poor,"(y) paupers who have been improperly refused relief may apply to the Sheriff for redress. The proceedings in such applications are regulated by Act of Sederunt.(z) The application may be made without the intervention of an agent, and either verbally or in writing. If the Sheriff is of opinion, upon the facts stated by the applicant, that he or she is not entitled to relief, a deliverance to that effect is pronounced; and against this deliverance there is the usual right of appeal. If the Sheriff, however, on those facts thinks the applicant entitled to relief, he makes an order directing the proper relieving officer to afford interim relief, until, on or before a day fixed, reasons for the refusal are lodged. This interim order must be intimated by the sheriff-clerk; and if the reasons are not lodged, it is made permanent. Where reasons are lodged, the Sheriff (if required) nominates an agent for the applicant, and (if necessary) directs a record to be made up and proof to be led, and then pronounces judgment in common form, either finding the applicant entitled to relief, and ordaining the respondent to determine the amount, or finding that the applicant is not entitled to relief. The Sheriff determines only as to the pauper's right to be relieved; the question of the amount to be given is for the Parochial authorities under the review of the General Board of Supervision. The interim order may be continued till final judgment, or discontinued, at the Sheriff's discretion. The causes are conducted on the same footing as if the poor person had been admitted to sue *in forma pauperis*.

(y) 8 and 9 Vict. c. 83, § 73 (App. cxvi).

(z) A. S. 12 Feb. 1846 (App. cxvii).

Removings and Ejections.

Section XXII.—REMOVINGS AND EJECTIONS.

1. *Nature of Proceedings.*

SOLEMN REMOVINGS.

2. *Ordinary Removings (Agricultural Subjects).*
3. *Ordinary Removings (Non-Agricultural Subjects).*
4. *Extraordinary Removings (Legal Irritancies).*
5. *Extraordinary Removings (Conventional Irritancies).*

SUMMARY REMOVINGS.

6. *Removings from Houses.*
7. *Removings from Houses Let for less than a Year.*
8. *Obligation in Lease to Remove.*
9. *Removing on Letter of Removal.*

EJECTIONS.

10. *Ejection as Enforcement of Removing.*
 11. *Petition for Summary Ejection.*
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1. *Nature of Proceedings.*—Removing is the process by which a tenant whose right to occupy heritable subjects has come to an end is warned to remove (so as to prevent the effect of the law of tacit relocation), and is ejected if he fail to attend to the warning. An ejection is the process by which a person who has no kind of right to occupy or remain longer in an heritable subject is ejected from it.

Removings are either ordinary or extraordinary,—“solemn” or summary. An ordinary removing is at the natural termination of the tenant’s right, on the expiry of the time for which the subject was let; an extraordinary removing is when the tenant’s right is interrupted during the currency of the lease by a legal or conventional irritancy. A solemn removing is one in which a summons of removing on forty days’ warning is required. All removings in which less formal proceedings are required are called summary, and they are of three kinds—(1) where verbal warning is enough; (2) removings under the Act of 1838,^(a) for houses occupied for less than a year; and (3) under the Act of 1853, for cases where the tenant has signed an express or implied obligation to remove. These do not exhaust all the kinds of removings which are competent, but they will be found to be sufficient to meet all emergencies that can well arise.

(a) 1 and 2 Vict. c. 119.

 Ordinary Removings (Agricultural Subjects).

SOLEMN REMOVINGS.

2. Ordinary Removings (Agricultural Subjects).—The power of removing from lands let for agricultural purposes is regulated by an Act of Sederunt passed in 1756. The landlord must raise a summons of removing, in such time as to leave an interval of at least forty days between the date of execution and the term of removal.(b) The summons is in the form provided by the Act of 1853, but must specially found on the Act of Sederunt.(c) It sets forth the titles of the pursuer, and defender or defenders. Sub-tenants need not be called unless the tenant have power to sub-let, or the landlord have recognised them. The conclusions are, that the defender be decerned to remove at the term under pain of ejection, and that, in case of opposing the summons, he be found liable in expenses. Sometimes expenses are also asked in the case of the defender not removing in terms of the decree. The summons is served on an *induciae* of six days. If the defender enters appearance, the case is put out for discussion on the grounds of action and defence, and unless the defender can instantly verify a defence excluding the action, he must come prepared with a cautioner for "violent profits," that is, for payment of all damages the landlord may suffer should the tenant keep possession longer than he has right to do so. If the defender come so prepared, he may plead any defences he thinks relevant; a record is made up in the usual way, and the case decided. And even though he should instantly verify the defence, a record should be closed so as to keep the case in form and preserve evidence of the ground of decision. When decree of removing is pronounced, it may be extracted within forty-eight hours.(d) The form of

(b) A. S. 14 Dec. 1756, § 2 (Alexander's Acts of Sederunt, first series, p. 76), amended by 16 and 17 Vict. c. 80, § 29. If there are two terms, one for land and the other for houses, the execution must be timed for the term which comes first. Formerly the time ran from the calling.

(c) *Carruthers v. Stormont*, 4 July

1764, M. 13,868. It need not libel the Act of 1853; *Granger v. Geile*, 16 July 1857, 19 D. 1010.

(d) A. S. 10 July 1839, § 113 (App. lx). As decrees of removing are reviewed by suspension, the provisions as to extracting contained in the Court of Session Act 1868 seem inapplicable. See *supra*, 222.

Solemn Removings.

the extract (which is provided for by the Act of Sederunt of 27th January 1830), orders the tenant to remove on a charge of forty-eight hours at or after the term, under pain of ejection.

3. Ordinary Removings (Non-Agricultural Subjects).—It is not altogether clear when a summons of removing is required for subjects which are not agricultural. For such subjects as mills (not being within burgh), mines and fishings, it seems indispensable to have a summons of removing;(e) and wherever houses in the country have any extent of land attached to them, especially if they be let on lease,(g) it is not advisable to dispense with a summons unless the tenant has granted an obligation to remove.

When a summons is used in the case of non-agricultural subjects, it is in the same terms as the summons in the case of agricultural subjects, except that the Act of Sederunt of 1756 is not set forth. The practice of warning solemnly from non-agricultural subjects by a precept of warning from the landlord, under the Act of 1555, c. 39, is almost obsolete.

4. Extraordinary Removings (Legal Irritancies).—When the irritancy on which the currency of the time is interrupted is one caused by the operation of the law, as distinguished from one caused by virtue of the express terms of the lease, the Sheriff-Court has no jurisdiction to remove,(h) except in two cases, in which the jurisdiction has been expressly given by the Act of Sederunt of 1756.

The first of the legal irritancies for which the Sheriff can remove is, where the tenant has suffered two years' rent to be in arrear. The summons concludes to have it declared that this irritancy has been incurred, and to have the tenant removed. It libels the Act of Sederunt of 1756, and proceeds in

(e) *Riddel v. Zinsan* (Wills), 21 Nov. 1871, M. 13,828; *Gordon v. Burnet* (Fishings), 25 Feb. 1783, M. 13,859.

As to mines, see *Hunter on Landlord and Tenant*, vol. ii, p. 83.

(g) Compare *infra*, art. 6.

(h) See note (p), p. 303.

Extraordinary Removings (Legal Irritancies).

other respects like any ordinary solemn removing.(i) The tenant can purge the irritancy (that is, get leave to remain), if he pays the arrears at any time before extract.(k) Where the lease under which the irritancy occurs is longer than twenty-one years in duration, it appears to have been thought that the Sheriff-Court had no jurisdiction, notwithstanding the Act of Sederunt—probably on the ground that such a lease is of the nature of a right to property rather than of a right of possession;(l) and accordingly, a limited statutory jurisdiction was given by the Act of 1853, where the annual value of the subjects let did not exceed £25. The irritancy is the ordinary one of allowing two years' rent to run in arrear, and the mode of enforcing it is *mutatis mutandis* the same as that for removing a vassal whose feu-duty is in the like position.(n)

The second legal irritancy under the Act of Sederunt of 1756 occurs where a tenant runs in arrear of one full year's rent, or deserts his possession, or leaves it unlaboured at the usual time of tilling. In any of these three cases the landlord may bring an action calling on the tenant to find caution for the arrears, and for the rent for the five crops following, or till the end of the lease, if it ends sooner. In this action the Sheriff fixes a time for the tenant to find caution; and if it be not found, decree of removing is pronounced as in an ordinary removing.(o) This irritancy the tenant may purge in the same way as the one already mentioned.

The legal irritancy incurred where the tenant does not stock his farm cannot be enforced in the Sheriff-Court. The Sheriff can pronounce a decree ordering the tenant to stock his farm, but he cannot carry it out.(p)

(i) A. S. 14 Dec. 1756, § 4.

(k) *Ballenden v. Argyll*, 6 July 1792, M. 7252. If he fail to purge the irritancy before extract, even though the decree be in absence, the opportunity is gone; *Kennedy v. Alison*, 11 March 1807; Hume, 578, and cases there cited; *Hunter on Landlord and Tenant*, vol. ii, p. 184.

(l) Compare *Stirling v. Walker*, 20 Nov. 1821, F.C., and the cases cited for the pursuer.

(n) 16 and 17 Vict. c. 80, § 32; *Whyte v. Gerrard*, 30 Nov. 1861, 24 D. 102.

(o) A. S. 14 Dec. 1756, § 5.

(p) *Horn v. M'Lean*, 19 Jan. 1830, S. 329; *M'Dougall v. Buchanan*, 11 Dec. 1867, 6 Macph. 120.

Solemn Removings.

5. **Extraordinary Removings (Conventional Irritancies).** Where the irritancy is conventional, it seems that the Sheriff may remove, because in that case the irritancy brings the lease to an end, in virtue of its own terms, just as much as if the number of years specified in it had expired.^(q) Thus, if the lease say that a tenant who becomes bankrupt is to remove, the landlord may, on that event happening, bring his action (founding upon the bankruptcy) before the Sheriff and get the tenant put out;^(r) but only, it seems, if the tenant be notour bankrupt,^(s) because the Sheriff-Court cannot investigate such a matter. A distinction has been attempted to be drawn between conventional irritancies which are penal and those which are not, with the view of giving the Sheriff jurisdiction in the latter case only; but the distinction is scarcely intelligible, for all irritancies are penal in any sense in which that word can be used in connection with them.^(t)

SUMMARY REMOVINGS.

6. **Removings from Houses.**—Solemn removings are not necessary for houses even when in the country, and when having gardens and ornamental grounds attached to them. Forty days' warning before the term must, however, be given to the tenant, but the warning may be verbal, provided it be sufficiently proved. If the tenant does not move after the warning, he may be ejected on a summary petition to the Sheriff. Most of the recent cases where this summary kind of removal has been used appear to have related to tenements of small value, and to tenements where no written lease has existed, but both those considerations in the present matter must be immaterial, because the value cannot govern the matter, and a lease which has come to an end cannot raise any stronger presumption of tacit

(q) *Hunter on Landlord and Tenant*, 3d ed., 129, and authorities there cited.

(r) *Scott v. Wotherspoon*, 27 Feb. 1829, 7 S. 481.

(s) *Hog v. Morton*, 4 March 1825, 3 S. 617.

(t) *See Rae v. Henderson*, 23 Feb. 1837, 15 S. 658.

Removings from Houses Let for less than a Year.

relocation, than a tenure under a verbal agreement.(u) If the landlord thinks it right, there is no objection to his using a formal summons of removing, as the expenses of the proceeding fall upon himself.

Within burghs, removings are conducted according to local customs, and under the direction of the burgh magistrates.

7. Removings from Houses let for less than a Year.—The Act of 1838 provides a summary mode of removing tenants from premises let for less than a year, when the annual value of the premises does not exceed £30.(v) The statute gives a form for the petition. The proceedings are conducted in the way used in the Small Debt Court, with this difference, that though the defender does not appear, the Sheriff must proceed with the case in the same way as if he had appeared; and that if the defender appear at any time before the decree has been carried into execution, he may get a farther hearing upon payment to the complainer of such expenses as the Sheriff may find reasonable. The form of the decree is given in the statute, and it is provided that it shall be final and not subject to review of any kind.

Where the defender appears and finds caution for violent profits, the case must be conducted in the ordinary manner. It is in the power, also, of the Sheriff, if he does not think the case suitable for being disposed of summarily, to order answers; and in that case, also, the action goes to the ordinary roll, and the defender, if the defence be not instantly verified, must find caution for violent profits.

8. Obligation in Lease to Remove.—Where any probative lease specifies a term of endurance, the lease, or an extract of it from

(u) *Sloweay v. Robertson* (rent £2, 12s., lease verbal), 2 Nov. 1865, 4 Macph. 1; *Chirnside v. Park* (rent £5, lease verbal), 8 March 1843, 5 D. 864; *Ramsay v. Conheath* (manor house), 18 Dec. 1630, M. 13,826; *Frendraught v. Seaton* (tower

and fortalice with yard and parks), 14 July 1699, M. 13,832; *Lundin v. Hamilton* (house in the country), 19 Dec. 1758, M. 13,845.

(v) 1 and 2 Vict. c. 119, §§ 8 to 14 (App. xxii).

 Summary Removings.

the books of any court of record, has the same force and effect as an extract-decree of removing obtained at the instance of the landlord against the tenant, provided that certain conditions are complied with. (x) *Firstly*, previous notice of at least forty days must be given to the party in possession before the expiration of the term, or, where the lease has separate terms for lands and houses, before the term which comes first. This notice is to be given by a sheriff-officer of the county in which the lands or heritages are situated, or by a messenger-at-arms, in the statutory form, (y) and is to be delivered to the party in possession, or to be left at his ordinary dwelling-house, or to be transmitted to his known address through the post office. This notice must (*secondly*) be proved either by a certificate in the statutory form, (z) indorsed by the officer on the lease or extract, and attested by a witness, or by an acknowledgment indorsed by the party in possession, or by his known agent on his behalf. *Thirdly*, the officer ejecting must have, in addition to the lease or extract, a written authority from the landlord, or from his factor or agent. *Fourthly*, the removal or ejectment must take place within six weeks from the expiration of the term of endurance.

A tenant threatened with ejection under these provisions may bring a suspension.

9. Removing on Letter of Removal.—Where any tenant grants a letter of removal, either holograph or attested by a witness, in a form provided by the Act of 1853, (a) the letter has the same force and effect as an extract-decree of removing, and is a sufficient warrant to any sheriff-officer of the county within which the premises are situated to eject, provided certain conditions are complied with. (b) The *first* and *second* of those conditions are, that if the letter bears date more than six weeks before the term of removal, notice must be given, and proved,

(x) 16 and 17 Vict. c. 80, § 80 (App. lxxxii).

(y) Act quoted, Sch. (I) (App. xciv).

(s) Act quoted, Sch. (J).

(a) *Ib.* Sch. (K).

(b) *Ib.* § 31.

Ejection as Enforcement of Removing—Petition for Ejection.

in the same way as under the preceding article; and the *third* is, that in like manner the ejection must be carried out within *six* weeks from the term.

The proceedings may be suspended in common form.

EJECTIONS.

10. Ejection as Enforcement of Removing.—The decree of removing, if not complied with, is carried into force by an ejection conducted by officers of court, who have power for that purpose to open shut and lockfast places, and to remove all the tenant's goods and effects from the premises, using all the requisite force for that purpose. In all ejections except those under the Act of 1838, a charge of forty-eight hours is given; (c) and under that Act, the time for the charge, if any, is fixed in the decree.

11. Petition for Ejection.—Petitions for ejection are presented against parties who have no legal right or title of any kind to possess the subjects, or whose right or title, if they ever had one, has been brought competently to an end. Sometimes the petition or action—for it may be either—is called one of intrusion, where the defender has recently taken possession of the premises, but the proceedings are in substance the same. It is of the essence of such a petition that it contain an allegation that the possession of the respondent is vicious or precarious without any title. (d) The proceedings (*mutatis mutandis*) are much the same as in the process of removing.

Section XXIII.—PROCEEDINGS CONCERNING SCHOOLMASTERS.

Under an Act passed in 1861, (e) the jurisdiction which the Presbyteries of the Church of Scotland formerly exercised over

(c) A. S. 27 Jan. 1830, Schedule (C);
Alexander's A. S. p. 404.

(d) *Hally v. Lang*, 26 June 1867, 5
Macph. 951.

(e) 24 and 25 Vict. c. 107, §§ 14, 15.

Ejections.

the good conduct of parochial schoolmasters was transferred to the Sheriff. Where a complaint is to be made against a schoolmaster, charging him with immoral conduct, or with cruel and improper treatment of the scholars, the heritors and minister of the parish, or the clerk of the presbytery (under its authority, given on the application of the heritors and minister, or of any six heads of families in the parish whose children are attending the school), may complain in writing to the Sheriff of the county in which the school is situate. The petition must specify the particular acts, in respect of which the complaint is made. A copy is to be served upon the schoolmaster, and he is required to appear on an *induciae* of fourteen days to answer to the complaint. The defender may, within the fourteen days, lodge written answers; or he may, when the cause comes to be tried, simply state his plea to be not guilty. The Sheriff thereafter will proceed to trial, and take evidence in the same way, and under the same rules, as in ordinary civil cases. Should the Sheriff find the complaint, or any relevant part of it, proved, he must pass such sentence of censure, suspension, or degradation, as in his opinion the case requires. The sentence is final, and not subject to review. There is no need for the personal presence of the respondent when sentence is being pronounced.(g) The Sheriff must ascertain and specify the expenses properly incurred by the complainers, and they are entitled to recover these out of the county rate.

Section XXIV.—SERVICE OF HEIRS.

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| 1. <i>Jurisdiction.</i> | 6. <i>Opposing Petition.</i> |
| 2. <i>Form of Petition.</i> | 7. <i>Appeal to Court of Session.</i> |
| 3. <i>Publication of the Petition.</i> | 8. <i>Recording and Extract.</i> |
| 4. <i>Proceedings.</i> | 9. <i>Reduction of Service.</i> |
| 5. <i>Competing Petitions.</i> | |

1. *Jurisdiction.*—Since 1847 the service of heirs has proceeded on petition to the Sheriff, instead of before a jury. The

(g) *Fleming v. Dickson*, 4 Mar. 1863, 1 Macph. 517.

Form of Petition.

regulations have been re-enacted in the recent Titles to Land Consolidation Act.^(h) In a petition for a general service, the heir applies to the Sheriff of the county within which the ancestor had at the time of his death his ordinary or principal domicile; and in the case of a special service, the heir applies to the Sheriff within whose jurisdiction the lands, or the burgh containing the lands, are situated. In both cases the Sheriff of Chancery has a co-ordinate jurisdiction; and he has the sole jurisdiction in general services when the ancestor had no domicile in Scotland at the time of his death, or when his domicile was unknown or doubtful; and in the case of all applications relating to lands situated in more counties than one.⁽ⁱ⁾

2. Form of Petition.—The form of the petition is prescribed by the statute. In the case of a general service, it sets forth when and where the ancestor died, and where he was domiciled at the time of his death. Then it states the relationship of the petitioner, and the character in which he desires to be served. If it be under a deed of provision, the deed must be specified by its date and the name of the grantor, or be otherwise described so as clearly to identify it. If it be a deed of entail, it may be referred to as already recorded in the Register of Tailzies, and only the destination, or such part thereof as may be deemed necessary, quoted.

In petitions for special service the domicile of the ancestor need not be set forth, but the lands in question must be, and that either by their full description, or by some leading name, coupled with a reference to some prior deed recorded in the Register of Sasines, where the full description will be found. The title of the ancestor must be set forth; and when it is an entail, the conditions must either be entered at full length, or referred to. The relationship or character the petitioner bears

(h) 81 and 82 Vict. c. 101 (App. cxxii).

(i) 81 and 82 Vict. c. 101; §§ 28 and

34 (App. cxxv). Sheriff-Court agents

may practise before the Sheriff of Chancery (§ 53).

 Service of Heirs.

is then set forth in the same way as in a petition for general service.

If a general service is desired, in the same character as that in which the special service is asked, it may be craved in the same petition as that for special service.

Where a general service is to be limited by a specification, that must be specially mentioned, and the specification duly given.

The petition is signed by the petitioner, or by his mandatory specially authorised.(k)

3. Publication of the Petition.—The petition is published at the Court-house, and at the office for Edictal Citations in Edinburgh. The publication at the Court-house is given by affixing a short abstract of the petition on the doors, or on some conspicuous place in the Court, or in the office of the sheriff-clerk, as the Sheriff may direct. The edictal publication is secured by leaving a short abstract of the petition at the office of Edictal Citations at the General Register Office, Edinburgh.(l) For all practical purposes, publication in these ways can have no value.

Caveats may be lodged with the Sheriff-Clerk by any person desirous of getting special notice; and then the clerk must post a notice of the presentation of a petition, to the address given, within twenty-four hours.(m)

4. Proceedings.—No evidence can be taken, or decree pronounced, in the petition till after the elapse of fifteen (n) days from the date of the latest publication. After that, evidence may be led before the Sheriff himself, or before a provost or bailie of any city, or royal or parliamentary burgh, or before any justice of peace, or before any notary-public, or before any commissioner whom the Sheriff may name.(o) The evidence

(k) Act, § 29.

(l) Act, § 30.

(m) Act, § 31.

(n) Act, § 33. Twenty days in the

case of Orkney and Shetland being concerned.

(o) Act, § 33. The power to justices and notaries to take evidence is new.

 Competing Petitions—Opposing Petition—Appeal to Court of Session.

is taken down in the same way as under proof on commission, and a complete inventory of all documents produced must be certified by the Sheriff or the person before whom the evidence was led. On considering the evidence, the Sheriff pronounces decree serving the petitioner, or dismissing the petition in whole or in part, as may be just.

5. Competing Petitions.—Where any person conceives himself to have a preferable right to be served, he may present a competing petition to the Sheriff; and at any time before pronouncing decree in the first petition, the Sheriff may sist it or conjoin it with the second. He may then allow each of the parties, not only a proof in chief, but a conjunct probation in reference to the claim of the other.(p)

6. Opposing Petition.—No person can oppose a petition unless he has a competing claim to be served. It does not seem essential that an opponent should lodge a notice of appearance, but he must present his objections in writing. The Sheriff is then directed to dispose of them in a summary manner after hearing (if he finds it necessary) parties orally thereon. This direction allows of no other record except the petition and the objections.(q)

7. Appeal to Court of Session.—Where the Sheriff pronounces a decree refusing to serve, or dismissing a petition, or repelling the objection of an opponent, the decree may be brought under review by a note of appeal. This must be presented within fifteen days from the judgment.(r) It must be intimated to an opponent or a competitor. The Court of Session deal with such appeals, as far as may be, as with appeals in ordinary actions, allowing additional evidence to be taken, or sending the case to

(p) Act, § 35.

(q) Act, § 40. This clause plainly applies to cases where the death of the ancestor is admitted and the only question is as to the service. Where the death is

not admitted, there is nothing to prevent any party interested from appearing.

(r) Act, § 42. Twenty days are allowed in the case of Orkney and Shetland.

Service of Heirs.

a jury, as they may find right.(s) If the Court of Session determine to serve, they remit to the Sheriff to carry out their judgment.(t)

8. Recording and Extract.—The petition, decree, proof, and inventories of documents, are transmitted by the sheriff-clerk to the office of the Director of Chancery, in Edinburgh, on the application of the petitioner, and the extracts are prepared in Chancery and thereafter returned to the sheriff-clerk to be given to the party or his agent. Separate extracts may be had, if required, where the petition related to separate parcels of land.(u)

9. Reduction of Service.—After a service has been carried through, a reduction of it may be brought at any time within twenty years(v) by any party having a competing title.(x) In such a reduction the *onus* of proof lies with the pursuer, but he does enough if he shows that the evidence on which the service proceeded was insufficient; and should he do that, the defender may lead farther evidence.(y) The case may be tried by jury, or in any way in which civil causes may competently be tried. When the Court of Session determines that any person is to be served, they remit to the Sheriff to carry it out.

Section XXV.—SEQUESTRATIONS.

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| 1. <i>Nature of Remedy.</i> | 7. <i>Reporting Sale.</i> |
| 2. <i>Sequestration in Payment.</i> | 8. <i>Sequestration in Security.</i> |
| 3. <i>Form of Application.</i> | 9. <i>Register of Sequestrations.</i> |
| 4. <i>Inventory of Effects.</i> | 10. <i>Caveat or Interdict against Sequestration.</i> |
| 5. <i>Proceedings if Petition Opposed.</i> | 11. <i>Breach of Sequestration.</i> |
| 6. <i>Sale of Sequestered Effects.</i> | |

1. Nature of Remedy.—A sequestration is the means by

(s) Act, §§ 41, 42, 44, and 45. When a record is required, it is made up in the Inner-House; Act, § 77 (App. ccxiii).

(t) Act as quoted.

(u) Act, § 36.

(v) 1617, c. 13.

(x) Act, § 48.

(y) *Alexander v. Officers of State*, 30 March 1868, 6 Macph. (H. L.), 54.

Sequestration in Payment—Form of Application.

which a landlord makes the effects secured to him by his right of hypothec available in payment of his rent; and it is of two kinds. Sequestration in payment is used when the term of payment has passed with the rent unpaid, and sequestration in security is used when the term of payment has not come. Frequently the same petition asks sequestration in payment of a past due rent, and in security of a rent about to become due.

2. Sequestration in Payment.—In agricultural subjects the crop of each year is held to be hypothecated for the rent of that year; and it, along with the stock, is secured by the right of hypothec for three months after the last legal or conventional term of payment.^(z) In house subjects the hypothec over the furniture lasts for the same period of three months. In sequestrating, therefore, it is only the crop of the particular year which can be touched; and the sequestration must be used while the right of hypothec lasts.^(a)

3. Form of Application.—The application is by petition, setting forth the title of the applicant and of the respondent, the lease or other tenure under which the farm or house is held, the date at which the rent fell due, and the fact that it is still unpaid. The prayer asks the Court to give a warrant or service, and, in the meantime, to sequester the effects on the premises in question, and to authorise an inventory of them to be made. The prayer may also contain a conclusion for a decree of payment of the rent,^(b) which it is sometimes useful to have. In special circumstances, to be set forth in the petition, the prayer may also ask for authority to bring back effects which have been illegally removed from the premises, as it is

(z) 30 and 31 Vict. c. 42, § 4. When agricultural produce or stock is sequestrated, furniture, implements, and imported manures cannot be included; *Id.*, § 6.

(a) See Act quoted, and Hunter on

Landlord and Tenant, ii, 363. Under leases current at the date of the Act the right of hypothec is more extensive, as the crop may be sequestrated at any time.

(b) A. S. 10 July 1839, § 151; 16 and 17 Vict. c. 80, § 27.

Sequestrations.

only to effects on the premises that the power to sequester extends.(c)

4. **Inventory of Effects.**—Unless a caveat has been lodged, or an interdict obtained,(d) the Court sequestrates and grants warrant to inventory at once on the petition being presented. Under this warrant an officer of court, in presence of a witness, makes an inventory of the whole effects secured by the hypothec, and returns an execution signed by himself and the witness. This inventory must be specific, and, where the premises are large, should give the particular place where each article is found, so that there may be no difficulty in identifying it. The inventory measures the extent of the sequestration, and anything not specified in it is not sequestered.(e)

5. **Proceedings if Petition opposed.**—Where the defender opposes the sequestration, he must enter appearance in the usual way. If he find caution for the rent, or consign it, the interim-sequestration will be recalled; and it will also be recalled as soon as it is made to appear that it is illegal. When the litigation goes on, a record is made up in common form. Where the sequestration has been recalled on caution, decree for payment of the rent and expenses incurred may be given against the tenant, and enforced against him and the cautioner;(g) and where it has been consigned, payment may be given out of the consigned money.

6. **Sale of Sequestered Effects.**—Where the sequestration is unopposed, or not successfully opposed, a warrant to sell is granted. This warrant may be given after the three months are out, provided the effects have been inventoried within the three months. A time and place for the sale are fixed by the

(c) *M'Lellan v. Graham*, 30 June 1841,
F. 2 Hunter, 394.

(d) *Infra*, Art. 9.

(e) *Horsburgh v. Morton*, 26 Feb. 1825,
3 S. 596.

(g) *Clark v. Duncan*, 3 Dec. 1833 12
S. 158.

Reporting Sale—Sequestration in Security.

Sheriff, and provision is made for duly advertising it. The sale is by public roup, and takes place at the sight of the clerk of court or of some person appointed by the Sheriff.^(h) Goods should be sold to the extent only of the rent and expenses; but it will be no objection that there is a small surplus.⁽ⁱ⁾

7. **Reporting Sale.**—Immediately on the sale being concluded, or at least within fourteen days thereafter, the roup roll, or a certified copy of it, and a state of the proceeds and expense of the sale, must be lodged in the hands of the clerk of court; and the Sheriff, if he see cause, or on the motion of either party, may order the gross proceeds to be consigned. The accounts are taxed by the auditor; the report of the sale is approved of the Sheriff; and any balance remaining over is paid back to the tenant.

8. **Sequestration in Security.**—Before the term of payment, if the tenant be in embarrassed circumstances so as to endanger the rent, the landlord may sequester in security, and the proceedings in this case are similar to those in a sequestration for payment, except that warrant to sell cannot be granted in general till after the term of payment. Where, however, the effects are perishable, and the tenant is bankrupt, and is allowing them to perish for want of care, or making away with them, warrant to sell may be granted at once.^(k) The Sheriff may also appoint a person to take charge of the sequestered effects^(l) where the tenant does not offer caution to make them forthcoming. If the rent be paid when due, it seems that the landlord must pay the expense of the sequestration, even though he had reasonable ground (such as the existence of arrears) for laying it on at the time.⁽ⁿ⁾

(h) A. S. 10 July 1839, § 150 (App. lxi).

(i) *Galloway v. McPherson*, 16 Feb. 1830, 8 S. 539.

(k) *Dow v. Hay*, 25th June 1784, M.

6202; *Wells v. Proudfoot*, 12 Feb. 1800, Hume 225.

(l) A. S. 10 July 1839, § 152. The power is applicable to any sequestration.

(n) *Gordon v. Suttie*, 11 June 1836, 14 S. 954.

Sequestrations.

9. Register of Sequestrations.—Under the Hypothec Amendment Act of 1867 the sheriff-clerk is bound to keep a register of all sequestrations issued, and to show it to any one applying on payment of a fee of one shilling.(o) The landlord should ascertain that this registration is complete, as the validity of the sequestration may be questioned if it be neglected.

10. Caveat or Interdict against Sequestration.—Where a tenant has reason to believe that sequestration is about to be used against him illegally, he may lodge a caveat which will ensure him an opportunity of being heard before the warrant is issued. When he wishes the question at issue between himself and the landlord settled without waiting till the latter chooses to move, he can apply for interdict. In both cases the landlord's right to sequester will not in general be interfered with, except on caution or consignment.(p)

11. Breach of Sequestration.—If the tenant removes or sells the sequestered effects, he is liable to be imprisoned on a summary petition for breach of sequestration. It hardly requires to be said that he is also liable for all loss and damage he may occasion. Any who knowingly assist him in these things render themselves liable, not only to summary imprisonment in the same way, but also in payment of the rent. It is not, however, a breach of sequestration for the tenant to use such of the sequestered effects as are required for the sustenance of his servants,(q) or of sequestered animals,(r) even though the effects be consumed in the using. And where the tenant is in *bona fides* in what he does, he will not, even though he break the sequestration, be liable to any arbitrary punishment. Thus, where a tenant thought that, in accordance with the general custom in his county, a certificate by the clerk of caution hav-

(o) 30 and 31 Vict. c. 42, § 7. The obligation to register applies also to sequestrations under the Small Debt and Debts Recovery Acts.

(p) 2 Hunter, 403.

(q) *M'Glashan v. Atholl*, 29 June 1819, F.C.

(r) *Miller v. Paterson*, 23 June 1851, 9 S. 792.

 Suspensions.

ing been lodged was a sufficient recall of a sequestration, and acted accordingly, he was held not liable in punishment.^(s)

Where a petition for breach of sequestration prays for penal consequences, the concurrence of the public prosecutor should be obtained, as in the case of a petition for breach of interdict.

 Section XXVI.—SUSPENSIONS.

Suspensions of the decrees obtained under the summary diligence system in use in Scotland are competent to a limited extent in the Sheriff-Court. Where a charge has been given on any decree of registration (which has proceeded upon a bond, bill, contract, or other form of obligation, registered in any Sheriff-Court books, or in the books of Council and Session, or other competent books), for payment of any sum of money not exceeding the sum of twenty-five pounds of principal, exclusive of interest and expenses, a suspension may be brought in the Sheriff-Court.^(t) It will be observed that the power here is very limited, that it applies only to the case of a charge for payment having been given, and of the amount charged for not exceeding twenty-five pounds, exclusive of interest and expenses, and that no mention is made of any power of liberating from prison where the charge has already been followed by imprisonment.

The application must be made to the Sheriff-Court of the domicile of the person charged. It cannot be made except on sufficient caution; but suspension seems always to be competent on that being found, although in most other kinds of suspensions, consignation is requisite, either at common law or under the obligation on which the decree has followed. Before the sist can be granted, the caution must be found for the sum charged for, and for the interest and expenses to be incurred in the Sheriff-Court. On the caution being found, the Sheriff has

(s) *Kippen v. Oppenheim*, 30 June 1846, 8 D. 957.

(t) 1 and 2 Vict. c. 119, § 19 (App. xxvi); and A. S. 10 July 1839, §§ 116, 117 and 118 (App. lxi).

Suspensions.

power to sist execution against the petitioner, to order intimation of the petition, and thereafter to proceed with the petition in the same manner as in the case of other summary petitions.

The sist should be immediately intimated to the charger. If he does not reside within the county the order should be indorsed by the Sheriff-clerk of the county where he does reside. If he lives out of Scotland, the intimation should be made to the mandatory, or other person in this country at whose instance the diligence is being carried out, for, although this may not be complete legal intimation, it would not be safe after this for the holder of the decree to go further.

Appeals from the Sheriff-Substitute to the Sheriff may be taken in suspensions in the usual way, but there is a provision that the Sheriff's decision on any preliminary objection to the competency or regularity of the petition shall be final. This provision, however, it will seldom be necessary to found upon, because nearly everything it could apply to is more stringently provided for by the provision of the Act of 1853(u) prohibiting all review of decisions in causes not exceeding the value of twenty-five pounds.

Section XXVII.—TAXATION OF AGENT'S ACCOUNTS.

The Act of Sederunt of 1839 provides simple machinery for taxing accounts between agent and client in certain cases. The provision applies only to accounts incurred in reference to actions, and where the client, moreover, does not dispute his liability. The agent or client may present a summary application to the Sheriff before whom the cause depends or depended for authority to have the account taxed. This is intimated on a service of at least seven days, and then the account is remitted to the auditor and taxed; and each party can object to the taxation, or appeal against the Sheriff's judgment as in an ordinary action. On the amount of the account being ascer-

(u) 16 and 17 Vict. c. 80, § 22.

 Action of Transference.

tained, decree for it may be given, extracted, and enforced in the usual way.(v)

 Section XXVIII.—ACTION OF TRANSFERENCE.

The action of transference is the means by which the representative of a deceased pursuer or defender, who will not sist himself, is forced to appear and pursue or defend the action to which his ancestor has been a party. The summons sets forth what the original action was, and the capacity in which the person called represents the deceased, and concludes that the representative, in the case of a pursuer, shall be ordained to appear and proceed with the cause; and, in the case of a defender, shall be decerned against in terms of the original conclusions. The action can be raised in the Sheriff-Court, only when the Sheriff before whom the original cause depended has jurisdiction over the representative also.(x) If this Sheriff has no jurisdiction over him, the action must be raised in the Court of Session. It would be of no avail to raise it before the Sheriff to whose jurisdiction the representative was liable, because the original action could not be remitted to that Court.

In the action of transference, the only question discussed is the competency of transferring; and that, when disputed, is disposed of as in an ordinary action. Should the Court decide to transfer, the action of transference is remitted to, or conjoined with, the original action, and that is proceeded with. Should the transference be in the Court of Session, the original action must be removed there by appeal *ob contingitiam*.

 Section XXIX.—TUTORS AND CHOOSING CURATORS.

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| 1. <i>Choosing Curators.</i> | | 3. <i>Act of Curatory.</i> |
| 2. <i>Curatorial Inventories.</i> | | 4. <i>Tutorial Inventories.</i> |

 1. Choosing Curators.—Where the father of a minor above

(v) A. S. 10 July, 1889, § 110 (App. lx). 1838, 16 S. 907, and authorities there
 (x) See *Cameron v. Chapman*, 9 Mar. cited.

Tutors, and Choosing Curators.

the age of puberty has died without naming curators, the minor may choose them. In order to do this the minor raises a summons (or edict) of curatory, in which he or she calls two of the nearest of kin on the father's side, and two on the mother's side, and all others having interest, to hear and see the curators chosen, and the curatorial inventories given up.(y) The next of kin are named individually and cited in the usual manner; and the "others having interest" are cited edictally at the market-cross of the head burgh of the county within which the minor's lands lie, or, if he has no lands, at the head burgh of his own domicile.(z) The summons is brought in the Sheriff Court within whose jurisdiction the minor resides; and, if it has to be served on persons beyond the jurisdiction, it must of course be duly indorsed.(a) If all the next of kin are out of Scotland, application must be made to the Court of Session. The summons proceeds on an *induciae* of nine days. On the summons being called in Court, the minor appears and makes choice of one or more parties to be his curators, whose appointment he may make simple or joint, with a *sine quo non* or a quorum, conditionally or unconditionally.(b) The curators then accept the office (in writing), and take the oath *de fidei administratione*. If they be not present, a commission may be granted to take their acceptance and oath. Usually the next of kin do not appear, but when they do appear the proceedings are the same.

2. Curatorial Inventories.—The next step is for the curator to give up an inventory of all the property of the minor. If the next of kin have appeared, they appoint a delegate to concur with the curator in making up the inventory, and when they do not appear, the Court appoints a delegate to concur for them. On the inventory being made up, three copies are pre-

(y) 1555 c. 35; *Wallace v. Kennedy*, 29 July 1674, M. 16,290.

(z) 1555, c. 35.

(a) *Burnet v. Burnet*, 1685, M. 16,306; 1 and 2 Vict. c. 119, § 24 (App. xxvii).

(b) *Fraser on Parent and Child*, by Cowan, p. 358.

Act of Curatory—Tutorial Inventories.

pared and lodged and sworn to as correct by the curator. One copy is set aside for the next of kin, the second is recorded in the books of Court, and the third is given back to the curator.

3. Act of Curatory.—When these things are completed, an act of curatory is extracted, and the curator is then fully installed in his office. The curator thus appointed acts both in law suits and in ordinary business. Where there are no such curators the Court may appoint a curator *ad litem* to act in any particular action which is depending.

4. Tutorial Inventories.—Although tutors cannot be appointed, they may give up the tutorial inventories in the Sheriff-Court in a manner similar to that used by curators. When the inventories are prepared and signed by the nearest of kin on each side, they are presented (along with a petition) to the Sheriff for authority to record. Where the next of kin have refused to concur, the petition is served on them, and calls on them to see the Sheriff name delegates to sign for them; and, unless cause is shown to the contrary, the Sheriff exercises that power.

Small Debt Court.

PART IV.

SMALL DEBT AND DEBTS RECOVERY COURTS.

CHAPTER I.

SMALL DEBT COURT.

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| 1. <i>Jurisdiction.</i> | 18. <i>Remitting to Ordinary Court.</i> |
| 2. <i>Nature of Proceedings.</i> | 14. <i>Counter Claims.</i> |
| 3. <i>Small Debt Circuits.</i> | 15. <i>Hearing and Evidence.</i> |
| 4. <i>Agents in Small Debt Courts.</i> | 16. <i>Judgment and Decree.</i> |
| 5. <i>What Actions Competent.</i> | 17. <i>Extract.</i> |
| 6. <i>Petitory Actions.</i> | 18. <i>Execution.</i> |
| 7. <i>Summons.</i> | 19. <i>At whose Instance.</i> |
| 8. <i>Citation.</i> | 20. <i>Execution beyond County.</i> |
| 9. <i>Arrestment in Security.</i> | 21. <i>Poinding and Sale.</i> |
| 10. <i>Decree in Absence of Defender, and Reponing.</i> | 22. <i>Imprisonment.</i> |
| 11. <i>Absolutor in Absence of Pursuer, and Re-hearing.</i> | 23. <i>Arrestment in Execution.</i> |
| 12. <i>Remits from the Ordinary Court.</i> | 24. <i>Furthcoming.</i> |
| | 25. <i>Multiplepoin ding.</i> |
| | 26. <i>Sequestration.</i> |

1. *Jurisdiction.*—The Small Debt Court is for the summary disposal of causes for the payment or distribution of sums of money not exceeding the amount of £12. In the original Small Debt Act of 1825 the limit was £8; which was extended by a new Act, in 1829, to £100 Scots. This Act repealed that of 1825.(a) When the Act of 1837 (which is the present Small Debt Act) was passed, the Act of 1829 was repealed, and various improvements made in the forms, but the jurisdiction remained at £8, 6s. 8d.(b) In 1853 it was

(a) 10 Geo. IV. c. 55.

(b) 1 Vict. c. 41 (App. cxli).

Nature of Proceedings—Small Debt Circuits.

extended to £12.(c) From some expressions in the Act of 1837, it probably was intended that the jurisdiction should also apply to disputes about things other than money, of less than the value in question, but the intention has not been carried out. In the Small Debt jurisdiction the Sheriff is not exercising a statutory jurisdiction where his whole powers are contained in the statute, but he is exercising the full powers of his ordinary jurisdiction with certain additional facilities conferred by the statute.(d) It is important to bear this in mind when cases occur for which the statute has not specially provided.

2. Nature of Proceedings.—The proceedings are of a summary kind. There are no written pleadings except the summons; the evidence is not reduced to writing, and the orders of Court are not written at length in interlocutor sheets, as in ordinary causes, but are shortly minuted in a book signed each court-day by the Sheriff. A form of this book is provided by the statute, and it is the only record retained in the court.(e)

Certain court-days are usually appointed for calling the Small Debt roll, but these are for convenience only, and a case may be adjourned to any other day.(g) The Table of Fees must be printed and hung up in the court room.

3. Small Debt Circuits.—For the Small Debt Courts the counties or Sheriff-Court districts are sub-divided into smaller districts, and Circuit Courts are held in each at different periods in the year. These divisions are made for convenience sake. It was at one time thought that it was imperative on the pursuer to bring his action in the district in which the defender was domiciled, unless where he got leave from the Sheriff, on special cause shown, to bring it in another district. But this

(c) 16 and 17 Vict. c. 80, § 28.

(e) 1 Vict. c. 41, § 117.

(d) See *Scott v. Letham*, 22 May 1846,
6 Bell's Ap. Ca. 126 (quoted *infra*, p. 381,
note (e)); and *Fraser v. Mackintosh*, 19
Dec. 1867, 6 Macph. 170.(g) *Weatherstone v. Gourlay*, 13 April
1860, 3 Irvine, 589.

Agents in Small Debt Courts.

reading seems to be incorrect, and has recently been decided to be so.(h) The clause of the statute governing the matter is somewhat obscure, but it seems that the pursuer has his choice, to bring the action either in the principal court or at the circuit court in which the defender resides. If there be different defenders residing in different circuits, the case must be brought in the principal court.

The Sheriff may at any time remove causes from any one court to any other, or, on special cause shown, allow the summons to be issued in a different court from that to which it would naturally fall. This special cause may be shown either in writing lodged with the sheriff-clerk, or on verbal application in open court, and it is enough to show that the course proposed will be expedient for the ends of justice.(i)

4. Agents in Small Debt Courts.—Agents are not allowed to appear in the Small Debt Court except with the special leave of the Sheriff, to be obtained on cause shown and recorded in the Book of Causes. The parties must appear in all ordinary cases by themselves, or by a member of their family, or by such other person (not being an officer of court), as the Sheriff may allow.(k) When agents do appear, there is no provision for making their remuneration a charge in the cause. The statute appears to have intended that a party desiring the assistance of an agent, and showing cause for obtaining it, should, nevertheless, have it at his own cost only, for it is anxiously provided that no other fees are to be taken or allowed except certain specified fees. Another view, however, is taken in some courts, and it is understood that small fees, fixed at the discretion of the Sheriff, are allowed.(l) When cases are remitted from the Ordinary to the Small Debt Court, it is usual to allow the expenses of agents, although the authority for this is not altogether clear.

(h) *M'Gregor v. Stewart*, 23 Sept. 1868 (Aberdeen Circuit).

(i) 1 Vict. c. 41, § 23.

(k) 1 Vict. c. 41, §§ 14 and 15.

(l) This has been the practice in Aberdeenshire for some time.

 What Actions Competent—Petitory Action—Summons.

5. What Actions Competent.—There are four actions competent in the Sheriff-Court, viz., the Ordinary or Petitory Action, the Action of Furthcoming, Multiplepoining, and Sequestration for Rent.

6. Petitory Action.—The petitory action may conclude for payment of a sum of money, due on any kind of claim, competent in the Ordinary Court, not exceeding the value of £12. It may also conclude for payment of penalties due for statutory offences;(*n*) and there is a provision that claims for compensation for injury by riot may be settled under it.(*o*) It is the value of the claim at the date of bringing the action which is the standard. If it be over £12, it may be restricted to that amount, the pursuer being held to have abandoned the rest of his claim. The expenses of bringing or conducting the action are not included.

7. Summons.—The form of summons is provided by the statute.(*p*) The origin of the debt or ground of action, and whenever possible the date of the cause of action or last date in the account, must be inserted. The summons must of course be relevant, and the ground of action shown in some way;(*q*) but it need not be stated at length or in detail.(*r*) Accounts founded on need not be annexed, but they must be referred to in the summons,(*s*) and a copy must be served on the defender. There is nothing to prevent a Small Debt summons from being amended, with the permission of the Sheriff.

(*n*) Small Debt Act, § 2; Act of 1853, § 26 (App. cxlii).

(*o*) Small Debt Act, § 22.

(*p*) Act, Schedule (A) (App. cxli).

(*q*) A decree for damages in transit, obtained on a summons for goods sold, was set aside; *Glasgow & South-Western Railway v. Wilson*, 5 May 1855, 2 Irv. 162.

(*r*) A summons on an account for a year's medical attendance, detailing nei-

ther visits nor specific charges, was sustained; *Mowat v. Martine*, 20 June 1856, 2 Irv. 435.

(*s*) See *Aitken v. Learmonth*, 27 April 1855, 2 Irv. 156, where it was held to be no objection to a summons that it gave no statement of the origin of the cause of action otherwise than by a reference to an account indorsed on the summons, but forming no part of it.

Citation—Arrestment in Security, &c.

The summons must have printed on it the Small Debt Table of Fees, and a sheriff-clerk issuing a summons without that table is liable to a fine.(t)

8. Citation.—The rules as to citation are much the same as in the Ordinary Court, and the defender is called to appear at a specified court, which must not be sooner than the sixth day after citation. No witness is required to the citation; and the citation may be proved either by an execution, or by the officer on oath in court.(u)

9. Arrestment in Security.—Arrestment on the dependence may be used, and the form of summons contains a warrant to that effect. There is a specialty that under a Small Debt summons wages cannot be arrested on the dependence.(v) It is also provided that all such arrestments cease and determine on the expiry of three months, unless they be renewed by special warrant or order duly intimated to the arrestee.(x) The Act also contains provisions and forms for loosing arrestments on the dependence. The loosing may either be on caution (found to the satisfaction of the sheriff-clerk) or on consignment of the debt sued for, with certain sums for expenses.(y)

10. Decree in Absence of Defender, and Reponing.—If the pursuer appear, and the defender be absent and unrepresented (art. 4), decree in absence may be pronounced, unless sufficient cause shall be shown for the non-appearance—in which case the Sheriff may adjourn the hearing.(z) The decree in absence may be opened up on the defender consigning with the clerk the expenses decerned for, and ten shillings to meet farther expenses. This must be done either before any charge has been given, or, if after a charge, before implement or before

(t) Small Debt Act, § 83.

(u) Act, § 3. The forms for citation and execution are contained in Schedule (A).

(v) 8 and 9 Vict. c. 89 (App. cxlv).

(x) Small Debt Act, § 6.

(y) *Ib.*, § 8.(z) *Ib.*, § 15.

Absolvitor in Absence of Pursuer, and Rehearing, &c.

three months' delay have followed the charge. What implement prevents reponing has already been considered.(a) If there be no objection to reponing, the clerk (on the consignment being made) issues a warrant which sists execution till next court-day, and gives authority to cite the pursuer and witnesses and havers for both parties to appear then. This warrant, duly served, is the authority for rehearing the cause. The consigned expenses must be paid over to the pursuer, unless the Sheriff see fit to order otherwise.(b)

11. *Absolvitor in Absence of Pursuer, and Rehearing.*—Where the pursuer fails to appear personally, or by a proper representative, the defender may get decree of absolvitor in absence.(c) The pursuer has a limited time after this within which he may apply to have the cause reheard. If within one calendar month after the absolvitor he consign with the clerk the expenses awarded to the defender, and five shillings for farther expenses, he may obtain a new warrant for citing the defender and witnesses for both parties to another court; and on this the case is reheard. The expenses consigned are paid to the defender, unless the contrary be specially ordered.(d)

12. *Remits from the Ordinary Court.*—Cases may come to the Small Debt Court from the Ordinary Court. Where an action is brought in the Ordinary Court for a sum not exceeding £12, or where the balance remaining due on an ordinary action has been reduced by interim decree or otherwise so as not to exceed that sum, the Sheriff may remit the cause to the Small Debt Court. The consent of the pursuer is, however, essential to this.(e) Should the pursuer unreasonably refuse his consent, the power contained in the statute of allowing him no expenses except Small Debt expenses can afterwards be used;(g) and this affords a sufficient check on him. The defender has it in

(a) *Supra*, p. 66, art. 6.(b) *Small Debt Act*, § 16.(c) *Ib.*, § 15.(d) *Small Debt Act*, § 16.(e) *Ib.*, § 4.(g) *Ib.*, § 36.

Remitting to Ordinary Court—Counter Claims—Hearing and Evidence.

his power to appeal against this remit from the Sheriff-Substitute to the Sheriff.(k)

When a case is remitted to the Small Debt roll, it is conducted, from the date of the remit, in all respects in the same way as if it had commenced there.

13. Remitting to Ordinary Court.—Where the Sheriff considers—either from the point of law involved, or from special circumstances—that the case is unsuited for disposal in the Small Debt Court, he may remit it to the Ordinary Court. When to do this is matter for his discretion alone. The mere ordering of any written pleading has *ipso facto* the effect of a remit to the Ordinary Court.(i) The cause, when remitted, must be conducted as if it had begun in the ordinary roll; and, whatever stage it may have been at in the Small Debt Court, a record must be made up, and proof (in so far as necessary) taken in the usual way.

14. Counter Claims.—Where the defender has a counter claim, he must serve a copy of it on the pursuer at least one free day before the day of appearance. If this is omitted, it cannot be heard without the consent of the pursuer.(k) It should be noticed, that it is before the day of appearance that the counter claims must be lodged, because it was not intended that summary proceedings should be delayed so that the defender might serve such claims before any adjourned diet. The statute does not put any limit in regard to the nature of the counter claims that are competent; and, seeing that it contemplates their being disposed of at once, this was not necessary. Where the counter claims require investigation, they may either be reserved in the decree, or, in special circumstances, the case may be adjourned to allow the investigation to be made.

15. Hearing and Evidence.—The summons contains authority

(k) Small Debt Act, § 4.

(k) Small Debt Act, § 11.

(i) *Ib.*, § 14.

Judgment and Decree.

for citing witnesses for the pursuer and the defender. The summons itself is the warrant to the officer to cite for the pursuer, and the service copy is sufficient evidence of the authority to cite for the defender. As the cases are disposed of summarily, all the witnesses must be present at the first calling, and adjournments are not generally granted, and when they are granted, it is almost always on condition of expenses being paid. If a witness duly cited does not attend, he may be fined summarily £2, and letters of second diligence granted to enforce his attendance. The citations do not require to be given in presence of a witness.(l)

The Sheriff hears the parties *viva voce*, and either disposes of the case on the relevancy of their averments, or hears evidence, as may be proper. When evidence is taken the witnesses are sworn and examined in the usual way, but no record is kept even of their names, still less of what they said. On special cause shown, the Sheriff may grant a commission to any competent person to take and report in writing the evidence of any witness unable to attend. He may also make remits to persons of skill to report. Oaths on reference, and all other such things, may be taken on the same principles as in the Ordinary Court, but without keeping any record.(n)

16. Judgment and Decree.—The Sheriff's judgments contain no findings in point of fact or law, but simply the order saying what is to be paid, and what the expenses are. This order is noted in the book of causes, and is the warrant to the clerk for issuing the decree.

The expenses are fixed according to the table provided by the statute, and in addition to them the Sheriff allows (as a necessary incident of the process) the expenses of witnesses, and (in virtue of a special provision) where he sees fit, the personal charges of the successful party.(o)

(l) Small Debt Act, §§ 8 and 12.

(o) Small Debt Act, §§ 13 and 32.

(n) *Ib.*, § 13.

Extract—Execution—At whose Instance.

Where he thinks it proper, the Sheriff may direct the sums due to be paid weekly, monthly, or quarterly, on such conditions as he may think right.(p)

17. Extract.—The form of the extract is provided by the statute, and it is written or printed on the summons.(q) It contains a warrant for instant execution by arrestment, and for execution by poinding and sale, and by imprisonment (if competent) either after ten free days, if the debtor have been formally present at the pronouncing of judgment, or after a charge of ten free days, if the defender was not personally present. This issuing of the warrant to sell in the decree itself, and this dispensing with the charge where the debtor has heard the judgment, are peculiar to Small Debt procedure.(r)

Second extracts (it is understood) cannot be given; and if the first extract be lost it is doubtful whether there is any remedy. In some courts it is held competent to bring a second summons for the amount, and to get a new decree on abandoning all claim under the first decree, and on proving that the first was not paid and has been lost.

18. Execution.—The execution proceeds much in the same way as on an ordinary decree. Care must be taken to give the charge when the terms of the decree require it. If the decree is not enforced within a year from its date, a charge must always be given, whether the decree specially require it or not; and where a charge is at first required, if the decree be not enforced within a year from the date of a charge upon it, a new charge must be given.(s)

19. At whose Instance.—There is no provision in the Small Debt Act for assigning decrees, such as is contained in the Personal Diligence Act for ordinary decrees; but they can be assigned at common law; and as the charges and executions

(p) Small Debt Act, § 18.

(q) Sch. (A), No. 7 (App. clxii).

(r) Small Debt Act, § 18.

(s) *Ib.*, § 13.

Execution beyond County—Poinding and Sale.

and schedules of poinding and imprisonment do not require it to be stated at whose instance they proceed, no difference need be made upon their terms, in the event of diligence being done by the assignee.(t)

20. Execution beyond County.—When a decree is to be enforced against the person or effects of a party within another county, it must first be indorsed by the sheriff-clerk of that county.(u)

21. Poinding and Sale.—After the expiry of the proper time, or of the days of charge where a charge has been requisite, the poinding is carried out in a summary way. The officer gets the effects duly appraised by two witnesses, and leaves a list with the party whose effects they are. The decree is not itself a warrant for opening doors or lockfast places, but if the poinding cannot be carried out without that, the officer must report the fact, and on doing so and applying for it, he will get the requisite authority.(v)

The sale is carried out not sooner than forty-eight hours after the poinding. The effects are taken to the nearest town or village, or, if they are poinded in a town or village, to the cross or most public place in it, and there are sold by the officer by public roup. Two hours' previous notice must be given by the crier, and the sale must take place between eleven forenoon and three afternoon. The Sheriff may (by general regulation or special direction) alter the hour or place for the sale, or appoint a longer or different kind of notice to be given. Any surplus, after paying the amount in the decree, and the statutory expenses of the poinding and sale, are to be returned to the owner or consigned with the sheriff-clerk if he cannot be found. Where the goods are not sold, they are delivered to the creditor at the appraised value to the extent of the debt and expenses of poinding and sale.

(t) Compare *Crombie v. M'Ewan*, 17 Jan. 1861, 28 D. 333.

(v) *Scott v. Letham*, 22 May 1846, 5 Bell's Ap. Ca. 126.

(u) Small Debt Act, § 19.

Imprisonment—Arrestment in Execution.

When the pointing is followed by a sale, or by delivery, it must be reported to the sheriff-clerk within eight days after the day fixed for the sale. Where no sale or delivery takes place, it is not the practice to report the pointing, and the statute does not seem to require it.

Any person secreting, or carrying off, or intronitting with any pointed effects *in fraudem* of the pointing creditors, or of the landlord's hypothec, is liable to summary fine or imprisonment, as for contempt of court, at the instance of the private party, or of the fiscal, or of the Sheriff *ex proprio motu*,—besides being liable in civil consequences.(x)

22. Imprisonment.—When the debt decerned for in the Small Debt decree is such as to make imprisonment competent, imprisonment may follow upon it. The charge, where required, having been duly given, and the necessary interval having elapsed where no charge is required, the apprehension of the debtor proceeds in the usual manner.(y)

Where the debt decerned for exceeds £8, 6s. 8d., the imprisoned debtor may bring the decree under review of the Sheriff by suspension and liberation. The proceedings in this process are the same as in the summary petition, and (it is presumed) the defender would not be liberated except on caution or consignment. It is not quite clear whether the Legislature, in providing this mode of redress, intended it to apply to other matters besides the regularity of the proceedings, but as the word review is general, it must include the merits also.(z) Practically, the provision is inoperative.

23. Arrestment in Execution.—Arrestment in execution proceeds on a Sheriff-Court decree without a charge in the same way as on an ordinary decree, and the forms provided in the Act for arrestment on the dependence are used with the neces-

(x) Small Debt Act, § 20, and relative
schedules.

(y) Act, § 13.

(z) 16 and 17 Vict. c. 80, § 26 (App.
lxxxii).

Furthcoming.

sary verbal alterations. The things that may be arrested are the same as on an ordinary decree; and, as on an ordinary decree, arrestment may proceed instantly.(a) An arrestment in execution expires within three months, in the same way as an arrestment on the dependence.(b)

24. Furthcoming.—Where the amount asked from the arrestee does not exceed £12, a furthcoming may be brought in the Small Debt Court. It is immaterial from what court the warrant on which the arrestment proceeded was issued, provided the sum arrested does exceed, or has been restricted, to £12. Bringing the furthcoming in the Small Debt Court will have no effect in restricting the pursuer's claim against the common debtor.(c)

The form of summons is provided in the statute.(d) The action is brought in the county in which the arrestee resides, and it cites him to appear at a court not sooner than the sixth day after citation. The common debtor, when in the same county, is cited on the same *induciae*, but if he reside out of that county he cannot be cited to appear sooner than the twelfth day after citation. It must always be so arranged that the arrestee and the debtor are cited to the same court.(c)

The action of furthcoming is disposed of on the same principles as an action of furthcoming in the Ordinary Court; and, in regard to practice, in the same way as a petitory action in the Small Debt Court.

When arrested effects have to be sold, a warrant to sell them, or as much of them as will satisfy the debt and expenses of process and the expense of sale, is inserted in the decree of furthcoming; and the sale is conducted like a sale of poinded effects under the Small Debt Act.(e)

(a) Small Debt Act, Sch. (A), No. 7.

(b) Small Debt Act, § 6. From the position of the provision in the statute, there is room for believing that it was

meant to apply to arrestments on the dependence only.

(c) Small Debt Act, § 9.

(d) Schedule (D).

(e) Act, § 20.

Multiplepointing—Sequestrations.

25. Multiplepointing.—Where any person holds a fund or subject not exceeding the value of £12, claimed by more than one party under arrestment or otherwise, he may raise a multiplepointing in the Small Debt Court.^(g) In practice, this power is used only in regard to funds of money. The statute provides the form of the summons.^(h) The action must be brought within the jurisdiction of the holder of the fund, and may be raised either by the holder himself or by one of the claimants in his name. The other parties must be cited in the way provided for in actions of furthcoming. At the calling of the cause the Sheriff may order claims to be given in, and (if necessary) may appoint such public intimation of the action as he thinks proper; but on the first day he cannot pronounce any judgment preferring any party to the fund. Under his powers at common law he may, however, order consignation. The claims, when given in, must be in the form provided for by the statute; and the nature and amount of the claim, and date of giving it in, must appear in the Book of Causes. The other proceedings are the same as in petitory Small Debt actions.⁽ⁱ⁾

26. Sequestrations.—In the Small Debt Court a landlord may sequester for rent, or a balance of rent, not exceeding £12; and that either in security or in payment. The summons is in the form prescribed by the statute,^(k) and the conclusions are for warrant to inventory, and, if need be, secure the effects upon the premises, and for decree for the rent or balance of rent. The summons also contains a warrant to inventory and secure the effects until the further orders of the court.

The officer forthwith inventories the effects and has them appraised by two witnesses, and an inventory is given to the tenant along with his citation. An execution of the citation and sequestration, with the appraisal, must be returned to the clerk within three days.

On the calling of the cause the Sheriff hears the parties.

^(g) Small Debt Act, § 10.
^(h) Schedule (E).

⁽ⁱ⁾ Small Debt Act, § 10.
^(k) Schedule (B).

Sequestrations.

If the sequestration be in security, he usually continues the case till after the term of payment to see if the rent be paid. Sometimes, however, decree is pronounced, with a proviso that it is not to be enforced until the term has passed with the rent unpaid. If the sequestration be in payment, he will dispose of it at once, either recalling it if it be improper, or decerning for the rent and granting warrant to sell the sequestrated effects if there be no good defence. The sale is carried out in exactly the same way as a sale of poinded effects.

The sequestration may be recalled by the clerk of court where the tenant either pays the rent and expenses, or consigns the rent, with £2 to cover expenses. In the case of payment, the clerk writes on the summons the words "payment made," and that operates as a recall. In the case of consignment, the clerk in like manner indorses the words "consignation made;" intimation is made to the landlord by an officer of court; and then the recall is complete.^(l)

Sequestrations in the Small Debt Court must be registered like other sequestrations.⁽ⁿ⁾

CHAPTER II.

DEBTS RECOVERY COURT.

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| 1. <i>What Debts may be Sued for.</i> | 7. <i>Expenses.</i> |
| 2. <i>Records of Court and Circuits.</i> | 8. <i>Appeals from the Sheriff-Substitute.</i> |
| 3. <i>Agents.</i> | 9. <i>Extract and Execution.</i> |
| 4. <i>Proceedings competent on Calling the Cause.</i> | 10. <i>Furthcoming.</i> |
| 5. <i>Proceedings at the Proof.</i> | 11. <i>Multiplepoindings.</i> |
| 6. <i>Judgment.</i> | 12. <i>Sequestrations.</i> |
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The Debts Recovery Court is an extension of the Small Debt jurisdiction to £50, accompanied by restrictions as to the kind of debt that may be sued for, and additional requirements

(l) Small Debt Act, § 5.

(n) 30 and 31 Vict. c. 42, *supra*, p. 316, art. 9.

What Debts may be Sued for.

in regard to the forms of process. In order to save repetition, there will be noticed here only the points in which the procedure differs from the Small Debt procedure.

1. What Debts may be Sued for.—The debts that may be sued for under the Debts Recovery Act are those which fall under the triennial limitation or prescription, or which would have fallen under that prescription but for their being constituted by a written obligation. The somewhat quaint words of the Triennial Prescription Act (a) have been copied in the Debts Recovery Act, and the jurisdiction therefore extends to actions of debt for “house maills, men’s ordinaries, servants’ fees, merchants’ accounts, and other the like debts;” and the qualifying words of the Prescription Act, “that are not founded upon written obligations,” are omitted. (b) Under “house maills” are included the rents of houses. Under “men’s ordinaries” come furnishings of all kinds of estables for consumption. “Servants’ fees” is very widely interpreted, and includes, in addition to the wages of ordinary servants, the remuneration of all kinds of professional men and workmen. To “merchants’ accounts” it has sometimes been attempted to give rather a restricted meaning, but without very much reason. It is admitted that it applies to wholesale as well as to retail dealings, but it has been questioned whether it applies to single as well as to repeated transactions. As every one, however, who buys or sells is for the time being a merchant, there is no reason for limiting the application of the statute to dealings with those who are merchants by profession; (c) and if this is conceded, it is equally clear that there is no reason for saying that an account must at least contain two entries. The words “other the like debts” serve to enable the Court to give a wide interpretation to all the enumerated classes.

(a) 1579, c. 83; Dickson on Evidence, §§ 476 to 487, contains a complete account of the scope of the Act.

(b) 80 and 81 Vict. c. 96, § 3 (App. clxxvi).

(c) The attempt to narrow the meaning of “merchant” to the petty village trader who goes by that name in Scotland, if carried out, would prevent the application of the Statute to wholesale accounts.

Records of Court and Circuits—Agents, &c.

The jurisdiction thus conferred is tolerably extensive, but still leaves some remarkable omissions. Thus, actions of damages are incompetent. Actions of aliment, where liability to afford the aliment is disputed, are also incompetent. So are actions on bills of exchange, guarantees, and other mercantile obligations. Rents for agricultural subjects seem also excluded.

In the Debts Recovery Court the debt sued for, exclusive of expenses and dues of extract, must exceed the value of £12, and be under the value of £50. Counter claims must be of the same nature, and between the same values, as the claims.

2. Records of Court and Circuits.—The records are kept much in the same way as in the Small Debt Court. The interlocutors are minuted in a Book of Causes, excepting when they set forth at length findings in law and in fact, in which case they are written on a separate paper, and their date inserted in the book. The Minute Book was apparently intended to be kept (like the Small Debt Book) so as to be a register of each day's proceeding in Court. In some Courts, however, the book is kept, not as a day book, but as a ledger, a large space being given to each case, and a note of each proceeding in it being added as it occurs, and signed by the Sheriff.

The Circuits which the Sheriff holds through his county or district, for the purposes of the Small Debt Act, are also available (under the same conditions) for Courts held under the Debts Recovery Act.

3. Agents.—The parties may appear and plead personally, or by any person *bona fide* employed by them in their usual business, or by a procurator of court.(d) The fifteenth section of the Small Debt Act not having been adopted, it is not competent to permit a party to appear by a member of his family, or by any person other than a procurator.(e)

4. Proceedings Competent on Calling the cause.—The sum-

(d) Debts Recovery Act, § 4.(e) *Ib.*, § 5.

Proceedings Competent on Calling the Cause.

mons is the same as the Small Debt summons, except that it contains no warrant to cite witnesses.(g) Counter claims must be pleaded at the calling of the cause, but it does not appear necessary to serve them on the pursuer.(h) On the cause being called, if both parties appear, the Sheriff hears them on the grounds of action and nature of the defence. If either party fail to appear, the Sheriff may decern in absence against him. The rules as to reponing are the same as in the Small Debt Court, except that the time for a pursuer getting himself reponed has been extended from one month to three.

After hearing parties the Sheriff makes a short note of their pleas. The statute, however, does not give to this note the effect of a record. Its use will be to guide the Sheriff who afterwards tries the cause, when to adjourn the proof, so as to give a party time to bring additional evidence, on the ground that he has been taken by surprise by the evidence adduced by his opponent. Should the case be appealed it will also be found useful. The general form is to minute first what the defender says in answer to the summons, and then what the pursuer replies. There is nothing to prevent the parties bringing a prepared note of their pleas for the Sheriff to revise and adopt.(i)

If the case appears unsuited for summary trial, it may be remitted to the Ordinary Court, in which case it will proceed like an ordinary action. After this, no objection that the debt is not of the kind that can be sued for in the Debts Recovery Court, can prevail.(k) There is no power of remitting causes to the Small Debt Court, or of remitting causes from the Ordinary Court to the Debts Recovery Court.

The Debts Recovery Act does not make any provision for causes being disposed of on the relevancy, but if a plainly incompetent or irrelevant cause were brought, the Sheriff could

(g) Debts Recovery Act, § 3.

(h) Section 11 of the Small Debt Act is not adopted; and there is no necessity for the pursuer having earlier notice of the counter claim than at the calling, because the proof does not go on till on another

day. If a counter claim is stated of a kind that is incompetent in the Debts Recovery Court, the case may be remitted to the Court Ordinary.

(i) Debts Recovery Act, § 8.

(k) *Ib.* § 8.

Proceedings at the Proof—Judgment—Expenses.

exercise his common-law power of dismissing the summons, or assoilzieing from the action as laid. There is no provision or power which would enable the Sheriff to give judgment simply on admissions made by a defender. After noting the pleas the Sheriff is directed to fix a time and place for proceeding to try and determine the cause, and to grant warrant for citing witnesses and havers for both parties.

5. Proceedings at the Proof.—At the trial, the evidence is not recorded, unless either of the parties request it to be so. When this request is made, the evidence may be recorded by the Sheriff in the ordinary way, or dictated to a clerk, or to a shorthand writer; but in no case does the note require to be read over to, or be signed by, the witness. The note of evidence sets forth the same particulars as if it were taken in an ordinary action.^(l) When the evidence is not recorded, there is no appeal from the decision of the presiding Sheriff on matters of fact.⁽ⁿ⁾

6. Judgment.—The judgment of the Sheriff must contain findings in point of fact, and findings in point of law, as well as the proper decernitures.^(o) By an oversight the Act omits to say that findings in fact are to be pronounced in the case of the evidence not having been recorded. This is obviously an omission, because where there is no record of evidence, and where the findings of the presiding Sheriff on fact are therefore to be final, it is more important to have them than in any other case.

7. Expenses.—The expenses payable to procurators are fixed in the Act,^(p) and though they cannot be increased, the Sheriff's common law power of modifying them or refusing them altogether, remains.^(q)

^(l) Debts Recovery Act, § 9.

⁽ⁿ⁾ *Ib.*, § 10.

^(o) *Ib.*, § 9.

^(p) Debts Recovery Act, § 18.

^(q) *Fraser v. Mackintosh*, 19 Dec. 1867, 6 Macph. 170.

Appeals from the Sheriff-Substitute—Extract and Execution, &c.

8. Appeals from the Sheriff-Substitute.—No appeal during the preparation of a cause is competent,^(r) but when the Sheriff-Substitute has pronounced the final judgment, the party thinking himself aggrieved may appeal to the Sheriff within eight days.^(s) The appeal is engrossed as in an ordinary action. In support of this appeal, no argument, written or oral, is permitted, but a note of authorities may be added to it. The Sheriff has power to order the case to be re-heard, and the evidence to be taken of new, or additional evidence to be taken.

9. Extract and Execution.—The rules as to extract and execution are the same as in the Small Debt Court,^(t) with two trifling exceptions, viz., that all poindings must be reported, whether they be followed by a sale or not,^(u) and that arrestments suffer the usual prescription.^(v)

10. Furthcoming.—The action of furthcoming is precisely the same as in the Small Debt Court; but whether it is the debt under which the furthcoming is brought, or the debt which it is intended to attach, or both, which is or are to be of the nature competent under this Act, does not clearly appear. As the limit of amount applies under the Small Debt Act to the debt to be attached, the limit of amount will apply to the same debt under this Act, and therefore the limit as to the kind of debt should apply to it also.^(x)

11. Multiplepoindings.—In multiplepoindings the fund *in medio* must exceed the value of £12, and not exceed the value of £50, and all the claims must be of such nature or value as could competently be claimed in a summons under the Debts Recovery Act. If any of the claims are not of this kind, the Sheriff has power to remit the cause to the ordinary roll.

(r) Debts Recovery Act, § 10.

(s) *Ib.*, § 11. Sixteen days are allowed in the case of Orkney and Shetland.

(t) Debts Recovery Act, §§ 9 and 11, concluding clauses.

(u) *Ib.*, § 16.

(v) *Ib.*, § 5, concluding proviso.

(x) *Ib.*, § 5; Small Debt Act, § 9.

Sequestration.

12. Sequestrations.—Sequestrations in payment are competent where the rent of the house,(y) or the balance of the rent, is over £12 and under £50.(z) The proceedings are the same as in a Small Debt sequestration.

It is doubtful whether sequestrations in security are competent in the Debts Recovery Court. As they were thought incompetent under the original Small Debt Act, a provision was inserted in the Act of 1853 declaring that the Small Debt Act should extend to sequestrations in security.(a) This provision of the Act of 1853 was not adopted in the Debts Recovery Act, and therefore the matter is not clear. But as a provision has been adopted, which has been declared by the Legislature to extend to sequestrations in security, their competency seems to be established.(b)

Sequestrations under the Debts Recovery Act must be registered like other sequestrations.(c)

(y) *Supra*, art. 1.

(s) Debts Recovery Act, § 5; *supra*, art. 1.

(a) 16 and 17 Vict. c. 80, § 28 (App. lxxxii).

(b) See a judgment by the late Mr Sheriff Cook, reported in the *Journal of Jurisprudence*, vol. 12, p. 152. In Lanarkshire they are thought incompetent

(App. cxcii); the same view is taken in Aberdeenshire, and much the same opinion is given in Mr Badenach Nicolson's Digest of the Act, p. 60. In the meantime, the practitioner will therefore act prudently by not raising sequestrations in security in the Debts Recovery Court.

(c) *Supra*, p. 316, art. 9.

Jurisdiction.

PART V. OF THE COMMISSARY COURT.

1. *Jurisdiction.*
2. *General Regulations.*

APPOINTMENT OF EXECUTORS.

3. *Petition.*
4. *Intimation.*
5. *Calling of the Petition.*
6. *Proof of Domicile.*
7. *Decree and Extract.*
8. *Competition for Office of Executor.*
9. *Interim Custody of Estate.*
10. *Executor dying before Confirmation.*

CONFIRMATION OF EXECUTORS.

11. *How Executors confirmed.*
12. *When, and to what amount, Caution must be found.*
13. *Bills to Inventories.*
14. *Confirmation ad non executa, omissa, vel male appreciata.*
15. *Of Confirming to English or Irish Property.*
16. *Certifying English or Irish Probates or Letters of Administration.*

1. *Jurisdiction.*—In practice, the jurisdiction of the Commissary Courts is limited to matters concerning moveable succession; and even here its duties are ministerial. The Court appoints executors where a person has died without naming them; and it confirms the title of all executors to act. If there are competitors for the office of executors, it decides who has the better right; and either in such cases, or when otherwise necessary, it can make arrangements for the interim custody of the estate. But (where a will is proved) it does not decide on its validity, or on questions as to the distribution of the estate. The confirmation of executors under a will does not conclusively affirm its validity. It makes debtors of the deceased who pay to the executors safe in doing so, but the validity of the will is still open to challenge in any competent

 General Regulations.

court. Most questions as to the validity of the will, or the distribution of the estate, may be tried in a multiplepinding in the Sheriff's Ordinary Court; but where a question of setting aside an apparently good will is raised, resort must be had to the Court of Session.

In regard to matters other than succession, the Commissary Courts, which inherited the jurisdiction of the Old Diocesan Ecclesiastical Courts, once had extensive powers, but these dwindled away till latterly the Courts exercised a jurisdiction only in consistorial actions; in small debt cases; and in actions for slander, where their jurisdiction had been preserved by their having the peculiar power of making the defender pronounce a "palinode," or recantation, under pain of imprisonment. The consistorial jurisdiction was transferred to the Court of Session.^(a) The small debt jurisdiction was abolished;^(b) and the action of palinode has fallen into such disuse that it is not worth while to repeat the rules concerning it.

2. General Regulations.—The appointment and confirmation of executors is mainly regulated by an Act passed in 1858;^(c) and by an Act of Sederunt, following on it, passed in 1859.^(d) Some minor points as to confirmations are also regulated by an Act passed in 1823.^(e) Where causes are litigated, the regulations laid down in the Act of Sederunt of 1839, as modified by the Act of 1853, are applicable.^(g) The fees of the commissary clerks are regulated by the Act of Sederunt of 1859, and they are entitled to charge "no other or higher fees" than those there stated. The fees for agents in the Commissary Court (who are the same as those in the Ordinary Court) are fixed by the Act of Sederunt of 1861.^(h)

(a) 11 Geo. IV., and 1 Will. IV. c. 69, § 22; 18 and 14 Vict. c. 36, § 16 (App. iii). See also 6 and 7 Will. IV. c. 41.

(b) 4 Geo. IV. c. 97.

(c) 21 and 22 Vict. c. 56 (App. cxciiv).

(d) A. S. 19 March 1859 (App. cciii).

(e) 4 Geo. IV. c. 98 (App. cxcii).

(g) *Anderson v. Gill*, 25 June 1850, 20 D. 1826; 16 April 1858, 3 Macq. 180.

(h) A. S. 1 March 1861 (App. ccxlvii).

Appointment of Executors.

APPOINTMENT OF EXECUTORS.

3. *Petition.*—Where the deceased has not named executors, or where those named by him have declined to act, the Commissary appoints them. The mode of application is by petition in the form prescribed by the Act of 1858.(i) The petition sets forth the name and designation of the deceased, the time and place of his death, and where his ordinary or principal domicile then was. It also sets forth the character in which the applicant asks for the appointment of executor-dative, whether as next of kin, relict, disponent, creditor, or otherwise as the case may be.

The application is made to the Sheriff of the county in which the deceased had his ordinary or principal domicile at the time of his death. If the deceased was not domiciled in Scotland, or had no fixed or known domicile, the application must be made to the Commissary of Edinburgh.(k)

4. *Intimation.*—Intimation of the petition is made at the Court House, and by publication in the Record of Edictal Citations. The publication at the Court House is done by the commissary-clerk affixing a full copy of the petition on the door of the Court House, or in some conspicuous place of the Court or clerk's office as the Commissary may direct. The publication in the Record of Edictal Citations is made by the Keeper inserting in it the names and designations of the petitioner and of the deceased; the place and date of the death, and the character in which the application is made. These particulars are supplied to him by the commissary-clerk, and after being printed and published,(l) a certified copy of the publication is returned to the clerk, who is then in a position to give the certificate of due intimation required by the statute.(n)

5. *Calling of the Petition.*—The petition is called in Court on

(i) Act, § 2 (App. xciv).

(k) Act, § 3.

(l) Act, § 4.

(n) 21 and 22 Vict. c. 56, § 4 and 5;

A. S. 19 March 1859, §§ 1-4.

Proof of Domicile—Decree and Extract.

the lapse of nine days (that is on the tenth day) after the date of the certificate of intimation.(o) If appearance is made for any party entitled to oppose the appointment, a record must be made up in the ordinary form. Where there is no opposition, applications from the next of kin or from the relict are generally granted at once, it not being usual to require evidence of the relationship. In applications from others, their title to the office must be produced, and must be satisfactory. Thus, an applicant for the office as disponent must produce a valid disposition; and an applicant for the office as creditor must produce either a liquid ground of debt, or a decree constituting it.

6. Proof of Domicile.—In the ordinary case, the fact that the deceased was domiciled in the county (without which there would be no jurisdiction) is taken on the statement of the applicant; but where the applicant desires to make his confirmation available as a title to administer personal estate in England or Ireland, satisfactory proof of the fact must be produced. In this case, the Act of Sederunt requires him to set forth, either in the original petition or in a special application, that the deceased had personal estate in England or Ireland; and then a special finding must be pronounced by the Commissary, "that the deceased died domiciled in Scotland." In order to obtain this finding, the applicant must bring forward sufficient evidence; and it is usual to take and record the evidence at full length (as under a petition for the service of an heir), although this does not appear to be necessary. On the Commissary being satisfied, the finding may be pronounced as a separate interlocutor, or may be embodied in the decree appointing the executor.(p)

7. Decree and Extract.—The requisite publication having been made, and (where necessary) the requisite evidence having been adduced, a decree appointing the applicant executor—

(o) Act quoted, § 6.

(p) 21 and 22 Vict. c. 56, §§ 9 and 17; A. S. 19 March 1859, § 6.

Appointment of Executors.

dative in the proper capacity is pronounced. This decree may be extracted on the expiration of three lawful days after it has been pronounced.(q) This extract, however, is not the executor's completed title to administer the estate. It is rather, as will presently be more fully explained (*infra*, art. 11), a copy issued to enable the executor to commence legal proceedings against parties who are disputing liability to the deceased. The completed title is not issued until the inventory duty has been paid to the Government.

8. Competition for Office of Executor.—When the appointment of an executor is opposed, the opposition usually resolves itself into a competition for the office. In this case a second petition is usually presented by the competing party, and of this either the clerk or the party, as the Commissary may direct, must make special intimation to the first petitioner.(r) The petitions are usually conjoined, and then the question which competitor has right to the office is fairly raised, and can be properly decided by the Commissary.(s)

In competitions for the office, competitors are preferred in the following order—(1) executors-nominate; (2) general disponees or legatees; (3) the next of kin in their order, those of the same degree (who apply) taking the office jointly, and the nearer degree excluding the more remote; (4) the widow; (5) creditors; and (6) special legatees. Formerly, the Commissaries were in use to appoint the procurator-fiscal of Court where no other person applied, but this is in disuse. Where subjects of foreign States die in Scotland, the consul, vice-consul, or consular agent may be appointed executor, if there be no other person rightfully entitled to administer the estate.(t)

(q) Act quoted, § 6.

(r) Act of 1858, § 5; A. S. 1859, § 5.

(s) Erskine, 8, 9, 32.

(t) 24 and 25 Vict. c. 121, § 4; and see *M'Laren on Wills and Succession*, vol. 2, pp. 148, 149, and 150 (from which

the paragraph above has been condensed), for the authorities, which are not given here—the question who is entitled to have the office of executor being one of law and not of process.

Interim Custody of Estate—Executor dying before Confirmation.

9. **Interim Custody of Estate.**—Where a person dies leaving no person to take charge of his estate, any one interested may apply to the Commissary to give authority to the Clerk of Court to inventory the effects, seal up the repositories, and make provision for safe custody until some person with a proper title shall be appointed. It would seem also that the Commissary, on such a case coming to his knowledge, might give the instruction *ex proprio motu*. The power, however, is merely ministerial, and is exercised for the sake only of taking care of property which no one else is taking care of. Where there are persons disputing about the right to the custody, the Commissary (as such) cannot take the custody from the person who actually has it, and give it to a neutral person.(u) In such cases a summary application may be made to the Sheriff.

10. **Executor dying before Confirmation.**—Where an executor dies after having been nominated by will, or appointed by the Commissary, but before confirming, there is sometimes a little complication in regard to appointing another executor. In the case of the deceased executor having been one of the next of kin, there is not much difficulty, because (by statute) the right of such next of kin transmits to their representatives, so that confirmation may be granted to the representatives, in the same way as it might have been granted to the original next of kin.(v) The representative will, however, have to present a new petition, and get himself decerned executor to the intestate in the ordinary way. In the case of executors who do not belong to the next of kin, a double confirmation is necessary. The representative of the deceased executor first confirms to the executor, including in the inventory, as part of his effects, the beneficial interest which he had in the estate of the first deceased. Of course it is only this beneficial interest which the

(u) *Milligan v. Milligan*, 17 Jan. 1827, 5 S. 206. It would be questionable, if it were worth questioning, whether this decision has been altogether satisfactory. In older times the Commissary

Courts exercised powers of an extensive kind in such matters, and these powers do not seem to have been curtailed by the Legislature.

(v) 4 Geo. IV. c. 98, § 1.

Confirmation of Executors.

representative can take up, because the office of executor, in so far as it is that of a trustee, is not transmissible.^(w)

CONFIRMATION OF EXECUTORS.

11. **How Executors Confirmed.**—The title which a person acquires by being nominated or appointed executor, is a title to sue for, but not a title to discharge, the debts due to the deceased. On the strength of his nomination or appointment, he may raise and conduct an action for a debt to the deceased, but before he can extract the decree, or enforce payment, or give a valid discharge, he must be “confirmed” to the office. This is done on his producing to the clerk of the Commissary Court his title to the office, with an inventory of all the deceased’s moveable estate, stamped with the proper amount of duty, and duly sworn to by him as correct, and in certain cases, on his finding caution (art. 12) for the due performance of his duties. The confirmation is completed in the Commissary Court which appointed, or, had it been necessary, could have appointed, the executors.

The duty of seeing that the title to the office and the inventory are complete, before issuing the confirmation, lies (practically) with the Clerk of Court, to whom the matter is left, unless the Commissary’s attention is specially called to the case. Wherever any doubt appears to exist as to the right of the applicant to obtain confirmation, the Clerk of Court should lay the matter, or cause the parties to lay it, specially before the Commissary for his instructions. Such doubts occur when questions are possible as to whether a will produced is sufficiently attested. In all such cases the Clerk of Court should take care,—in order to save himself from the responsibility he might otherwise incur by issuing a confirmation when he ought not to have done so,—to have the Commissary’s instructions in writing.

The whole estate, so far as known, must be included in the inventory,^(x) except in the case of an executor-creditor, who has the privilege, if he chooses, of confirming only to so much

(w) *McLaren, ut supra*, pp. 153, 154.

(x) 4 Geo. IV. c. 98, § 3.

When, and to what amount, Caution must be found.

of the estate as will be sufficient to pay his debt. In the case of an executor-creditor, there is the further peculiarity that notice of the application for confirmation must be inserted in the *Edinburgh Gazette* immediately after being made.(y)

The inventory and the will, where there is one, are recorded in the Commissary Court Books. On the recording being complete, the clerk issues the confirmation. This writ is substantially the same in testate and in intestate succession; but the narrative varies slightly to suit the circumstances, and in the former it receives the name of "testament-testamentar," and in the latter of "testament-dative." The writ runs in the name of the Commissary; narrates the title to the office of executor, and the giving up of the inventory; and proceeds formally to make or ratify and confirm the appointment, and to give full power to the executor to administer the personal estate of the deceased. It is sealed with the seal of the Commissary Court, and then makes the completed title to administer the estate. The forms are provided in the Act of 1858.(z)

12. When, and to what amount, Caution must be found.—Caution had formerly to be found by all executors, but executors-nominate are now exempt. In the case of other executors, the caution which has to be found is for the amount confirmed, unless the Court sees fit to restrict the amount. Where an executor desires to have the amount of the caution restricted, he presents a short petition stating the grounds on which he proposes that this should be done. Of this petition the Sheriff orders such publication as he thinks right, usually by advertisement once or twice in a newspaper circulating in the county, and then he disposes of it according to his best discretion.(a)

13. Eiks to Inventories.—Where it is discovered by the exe-

(y) 4 Geo. IV. c. 98, § 4.

(z) Schedules (B) and (E) (App. cci).

(a) 4 Geo. IV. c. 98, § 2; Alexander's Practice of the Commissary Courts, p. 58.

Confirmation of Executors.

cutor that he has omitted to give up any property belonging to the deceased, he must cause an additional inventory to be given up; and on this he gets a new confirmation. This confirmation will be almost *verbatim* the same as the original one, but the giving up of the additional inventory will of course be narrated, and power will be given to administer the effects specified in it. This proceeding is called making an "eik" or addition to the inventory, and it is carried through before the clerk in the same way as a first confirmation.

14. Confirmation ad non executā, omīssa, vel male appreciata.—These kinds of confirmation are seldom required now. The confirmation *quoad non executā* may be used where a confirmed executor has died without getting the funds transferred to himself as executor. When it is required, a special petition must be presented, to be dealt with in the ordinary way. Confirmations *quoad omīssa vel male appreciata* are almost unknown, and usually an eik to the inventory serves all the purpose. Sometimes, however, they are used by a second executor-creditor desirous of taking up debts which a first executor-creditor has neglected or found unnecessary for his purpose. The applicant proceeds as in the ordinary case.

15. Of confirming to English or Irish Property.—When it has been proved to the satisfaction of the Commissary that a deceased person was domiciled in Scotland, property situated in England or Ireland may be included in the inventory. The proof as to the domicile is taken in testate succession on a note presented to the Commissary, and is disposed of in the same way as in intestate succession.(b) A finding is also pronounced in the same way. The confirmation then proceeds as usual, the English or Irish property being included in the inventory, and, when complete, is presented by the executor, along with a certified copy of the interlocutor of the Commissary finding that the deceased died in Scotland, to the Principal

(b) *Supra*, art. 6, p. 345.

Certifying English or Irish Probates or Letters of Administration.

Probate Court in England or Ireland. The confirmation is then sealed with the seal of the English or Irish Court, and thereafter has the same force and effect in England or Ireland, as the case may be, as if a probate or letters of administration had been granted.(c)

16. **Certifying English or Irish Probates or Letters of Administration.**—When probates or letters of administration, granted in England or Ireland to persons domiciled in those countries, embrace property situated in Scotland, they may be produced in the Commissary Court at Edinburgh, and a copy deposited there; and (on a certificate being indorsed on them by the Edinburgh commissary-clerk that this has been done) they become as available for recovering the property in Scotland as a confirmation would be. Before being presented in Edinburgh, the probate or letters must have a memorandum written upon them by the proper officer of the English or Irish Court, bearing that the deceased was domiciled in England or Ireland, as the case may be.(d)

(c) 21 and 22 Vict. c. 56, §§ 12 and 13.

(d) 21 and 22 Vict. c. 56, § 14; 22 Vict. c. 30.

 The Modes of Appealing—Unextracted Interlocutors or Judgments.

PART VI.

OF APPEALS TO HIGHER COURTS.

CHAPTER I.

OF THE VARIOUS MODES OF APPEALING.

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| 1. <i>The Modes of Appealing.</i>
2. <i>Unextracted Interlocutors or Judgments.</i>
3. <i>Extracted Interlocutors or Decrees.</i> | 4. <i>Commissary Court Decisions.</i>
5. <i>Small Debt Court Decisions.</i>
6. <i>Decisions under Debts Recovery and other Special Acts.</i> |
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1. *The Modes of Appealing* from the decisions of the Sheriff-Court to higher Courts are not uniform. There are differences in the different forms of action, as to the way in which the appeal is to be presented; as to the Court before which it is to be taken; and as to the powers of the reviewing Court. And in the same action there are differences as to the form of appeal, according to the stage at which it is taken, and according to the purpose for which it is taken.

2. *Unextracted Interlocutors or Judgments.*—In the great majority of actions the appeal for the simple purpose of reviewing the decision of the Sheriff-Court is to the Court of Session, and is taken by the appeal which (under the Court of Session Act 1868) has come in place of the old form of advocacy. This form is used in all appeals from decisions in the Ordinary Court, entered before the judgment has been extracted, with the

Extracted Interlocutors or Decrees.

exception (A) of certain special interlocutors, and (B) of the decisions in certain special actions, for which other provisions have been expressly made.

(A) The special interlocutors for which there are special modes of appeal are those allowing proof, which (when the pursuer's claim exceeds £40) may be taken to the higher Court, by a special form of appeal, to have the case tried before a jury. There is also a special form (resembling one) of appeal by which, on case stated, parties who are agreed as to the facts, may take the opinion of the Court of Session on any point of law.

(B) The actions in which appeal is incompetent, even before extract, are those summary applications in which warrants are issued either at once, or in shorter than the usual periods for extract. These actions are removings and ejections; petitions for lawburrows; by masters for the apprehension of servants deserting service; for warrants to apprehend as *in meditatione fugæ*; and for the removal or censure of schoolmasters. In these cases the mode of review is by "note of suspension;" and the essential difference is, that caution to some extent is generally made a condition of staying execution.

3. Extracted Interlocutors or Decrees.—In the Ordinary Court, after decree has been extracted, the mode of review is by "note of suspension;" and in certain cases, where suspension is incompetent, by action of reduction. Both of these actions are brought in the Court of Session. Suspension is applicable to those cases in which the extract-decree contains a warrant (not being for expenses) capable of being made the foundation for execution against the goods or person; and (in general) the execution will not be stayed except on caution. Reduction is applicable to all other extracted decrees.

4. Commissary Court Decisions.—From decisions in the Commissary Court, the mode of appeal is the same as in the Ordinary Court.

 Appeals for Review.

5. **Small Debt Court Decisions.**—From the Small Debt Court the appeal is to the Court of Justiciary, which was selected on account of the convenience given by its holding circuits. The power of the Reviewing Court is here strictly limited.

6. **Decisions under Debts Recovery and other Special Acts.**—From the Debts Recovery Court the appeal is to the Court of Session, in a form regulated by the Debts Recovery Act. In the processes of *cessio bonorum*, and for the service of heirs, and in the proceedings connected with ecclesiastical buildings and glebes and entailed estates, the mode of appeal is in each case regulated by the special Statute.

 CHAPTER II.

 OF APPEALS.

APPEALS FOR REVIEW.

1. *In what Actions competent—The £25 Limit.*
2. *Appeal in Actions ad facta præstanda.*
3. *Against what Interlocutors.*
4. *Interlocutors Sisting Process.*
5. *Interlocutors giving Interim Judgment.*
6. *Interlocutors disposing of the whole Merits.*
7. *Form of Appeal.*
8. *Time of Appeal.*
9. *Notice of Appeal.*

10. *Transmission of Process.*
11. *Enrolment of Appeal, and Printing Papers.*
12. *Powers of Court of Session.*
13. *Hearing, Proof, and Judgment.*
14. *Respondent failing to Appear.*
15. *Appellant withdrawing Appeal.*
16. *Possession pending Appeal.*

APPEALS NOT FOR REVIEW.

17. *Appeal on Case stated.*
18. *Appeal for Jury Trial.*
19. *Appeal on Contingency.*

 APPEALS FOR REVIEW.

1. **In what Actions competent—The £25 Limit.**—Under the Act of 1853 the power of appealing for review (in any form) is prohibited in causes “not exceeding the value of £25 sterling.”(a) This was an extension of a provision made by an older Act, by which appeals were prohibited when the cause did

(a) 16 and 17 Vict. c. 80, § 22 (App. lxxix). This is the same limit as that in which the Sheriff-Courts have private jurisdiction; *supra*, p. 12.

In what Actions Competent: The £25 Limit.

not exceed the value of £12. In ascertaining "the value of a cause" for the purposes of review, the Court of Session have proceeded on extremely stringent principles of construction.

The first thing to be looked at is the value concluded for in the summons; and if the sum concluded for, with interest to the date of the judgment complained of, is above £25, that shows that there is jurisdiction.(c) The mere sum of money concluded for in the summons is, however, not the only thing to be looked at; and though the pursuer may ask for a smaller balance than £25, yet if the summons show that this balance is brought out by taking credit for such an amount of counter accounts as would otherwise have left the debt due by the defender larger than £25, there is jurisdiction.(d) Expenses, it is held, are not to be reckoned in making up the amount to £25.(e)

If the summons, thus interpreted, gives jurisdiction to the appellate Court, the record is not to be looked at, and it is immaterial though the value shown from it be much less. Thus, in an action for £32, where £26 was paid to account in the course of the proceedings, and the litigation was entirely as to the remaining balance of £6, the value of the cause was nevertheless held to exceed £25.(g) On the same principle, in an action brought for aliment, where—(the person to be alimented having died in the course of the proceedings)—the pursuer restricted his claim to the amount of £13, 6s. 8d. (all he had actually paid out) the value was held to exceed £25.(h) This principle is carried out consistently to the conclusion that, though the whole value at stake may be nothing at the date of the decree, the right of appeal remains as to the question of expenses.(i)

(c) *Mitchell v. Murray*, 10 Mar. 1855, 17 D. 682.

(d) *Inglis v. Smith*, 17 May 1859, 21 D. 822.

(e) *Hopkirk v. Wilson*, 21 Dec. 1855, 18 D. 299.

(g) *Wilson v. Wallace*, 6 March 1858, 20 D. 764.

(h) *Buie v. Stiven*, 5 Dec. 1863, 2 Macph. 208.

(i) *Robertson v. Wilson*, 3 Mar. 1857, 19 D. 594.

 Appeals for Review.

If the summons does not show jurisdiction, the next thing is to look at the record; and if the value of the cause estimated by trying what would be the effect of a judgment in favour of either party is over £25, there is appellate jurisdiction. Thus, in an action for £23, in the course of which the demand was reduced still further to £18, the Court of Session held that they had jurisdiction, because the question tried was as to the validity of a certain contract, the consideration for which had been £28.^(k) This decision could more easily have been understood had the contract been one the fulfilment of which was still possible; but as the contract had been broken it would have seemed more natural to have said that the value of the cause was not the original consideration, but the damage occasioned by the breach of the contract, about which the parties were actually litigating, and which was all that was claimed or by possibility could be claimed. Where the contract founded on is a current one, and the question decided between the parties will be *res judicata* as to a larger amount than £25, there is appellate jurisdiction, although the amount involved in the actual action be less than £25; and for this the reasons are easily understood.^(l)

2. Appeal in Actions *ad facta præstanda*.—In actions *ad facta præstanda* and in interdicts, where a pecuniary value is not directly at stake, there is always appellate jurisdiction. Thus the Court of Session held that the right of review existed in an action as to the ownership of an animal, although it appeared from the record that the animal had been sold at a public sale for the sum of £3, 5s.⁽ⁿ⁾ Where actions of this kind contain alternative conclusions, one of them being for money, it depends on circumstances whether there is review. If the conclusion for the money—of course not exceeding the value of £25—is the

(k) *Brydon v. Macfarlane*, 2 Nov. 1864, 8 Macph. 7.

(n) *Purves v. Brook*, 9 July 1867, 5 Macph. 1008.

(l) *Drummond v. Hunter*, 12 Jan. 1869.

Against what Interlocutors—Interlocutors Sisting Process, &c.

principal conclusion, and the delivery, or other remedy, is asked only in the event of the money not being paid, there is no review ;(o) but, on the contrary, if the delivery be the principal matter, and especially if decree have been given for it alone, there is jurisdiction.(p)

3. Against what Interlocutors.—The Act of 1853 prohibits appeals against all interlocutors except those—(1) sisting process ; (2) giving interim decree for the payment of money ; and (3) disposing of the whole merits of the cause.(q)

Interlocutors pronounced by the Sheriff-Substitute may be reviewed by the Court of Session, though they have not been appealed to the Sheriff. The opinion which the Court of Session at one time intimated against the expediency of such a course(r) has not been given expression to in recent cases.

4. Interlocutors Sisting Process require no observation. The right of review has been granted, apparently on the ground that to delay the pursuer's claim may practically be to defeat it.

5. Interlocutors giving Interim Judgment for the payment of the money are reviewable, however small the amount may be which is involved, provided the action be one in which appeal is otherwise competent, and the interim judgment be such as to authorise interim decree being extracted. It will be observed that the Act of 1853 has limited the power of review, in the case of interim decrees, to those for the payment of money. Where, therefore, a judgment is of such a kind that it neither orders payment of money, nor disposes of the whole

(o) *Cameron v. Smith*, 24 Feb. 1857, 19 D. 517.

(p) *Cooper v. Bone*, 18 Dec. 1823, 2 S. (N. E.) 511.

(q) 16 and 17 Vict. c. 80, § 24 (App. lxxx).

(r) *Malcolm v. Ballandene*, 30 June 1835, 12 S. 1021.

Appeals for Review.

merits, there is no appeal.(s) In like manner, when interim interdict has been refused there is no appeal.(t)

6. Interlocutors disposing of the whole Merits are those which either leave nothing to be done in the action except to settle the matter of expenses.(u) or actually put the pursuer or defender out of Court. Interlocutors which dispose of the whole cause are to this effect interlocutors on the merits, although technically the merits may not have been touched. For example, judgments by default,(v) and judgments sustaining dilatory defences, are appealable.(x) It is not necessary that the question of expenses have been disposed of; or, if they have been found due, that they have been modified or decerned for.(y)

7. Form of Appeal.—The appeal is taken by the appellant or his agent either writing a note of appeal on the interlocutor sheet, or lodging a separate note of appeal. This is done in the Sheriff-Court, and the Sheriff-Court agent will therefore be the proper agent to sign this note. It is to be remembered that an agent must have special authority from his client to do this.(z) The note may be in the following terms: "The pursuer (or other party) appeals to the Division of the Court of Session." It must specify the Division, and must be dated.(a) The appellant is not required to give security for the expenses to be incurred in the appeal.(b)

(s) *M'Kensie v. Boutelleau*, 16 June 1855, 17 D. 948. As to whether, when such an interlocutor has been extracted, there is not a power of suspending a threatened charge, see *infra*, Chapter III.

(t) *Cathcart v. Sloss*, 11 Feb. 1865, 3 Macph. 521. As to whether there is no redress if it be granted, see *infra*, Chap. III.

(u) *Per* Lord President in *M'Kensie v. Boutelleau*, *supra*, note (s); and see also 81 and 32 Vict. c. 100, § 51.

(v) *Martin v. Hadden*, 3 Dec. 1833, 12 S. 155.

(x) *Whyte v. Gerrard*, 30 Nov. 1861, 24 D. 102.

(y) 16 and 17 Vict. c. 80, § 24.

(z) *Stephen v. Skinner*, 17 Dec. 1863, 2 Macph. 287.

(a) 81 and 32 Vict. c. 100, § 66 (App. cex).

(b) *Ib.*, § 65.

Time of Appeal—Notice of Appeal—Transmission of Process, &c.

8. **Time of Appeal.**—The appellant has twenty days after the date of the appealable judgment, within which it cannot be extracted, allowed to him for the purpose of appealing. He can appeal at any time within that period; and, so long as the judgment in question has not been actually extracted or implemented, he may still appeal after the expiry of that period at any time before the lapse of six months from the date of the final judgment in the cause.(c)

9. **Notice of Appeal.**—Within two days after the date of any appeal being taken, the sheriff-clerk must send written notice of it to the respondent or his agent. If this notice be omitted, the Court of Session must take such steps as it thinks proper to remedy the inconvenience or disadvantage thereby occasioned, but the omission does not invalidate the appeal.(d)

10. **Transmission of Process.**—Within the same two days, the clerk of the Sheriff-Court must transmit the process to one of the clerks of the Division to which the appeal is taken. This transmission must be made by the sheriff-clerk, and he must not give the process to the agent for either party to transmit.(e) On receiving the process, the Court of Session clerk must mark upon the appeal the date of receipt.(f)

11. **Enrolment of Appeal, and Printing Papers.**—At any time after the expiry of eight days after the date on which the receipt of the appeal was noted it is competent for either party to enrol the appeal. On the appeal being called in the roll of the Division, the Court decide what papers are to be printed for their use. In general they will order the record, the interlocutors, the note of appeal, the notes of evidence, and the pro-

(c) 31 and 32 Vict. c. 100, §§ 67 and 68. "Implement" must here have its natural meaning, as (the judgment not having been extracted) there can be no question of poiding or imprisonment.

(d) 31 and 32 Vict. c. 100, § 70.

(e) *Innes v. Fife*, 18 June 1859, 12 D. 1007.

(f) 31 and 32 Vict. c. 100, § 71.

Appeals for Review.

ductions to be printed ; but they may dispense with the printing of any portion. If the appellant fail to appear at the enrolment, the Court may dismiss the appeal and affirm the interlocutors complained of ; and if he fails to comply with the order to print, the same may be done. Before dismissing for non-appearance, however, it is understood that the Court will order some kind of intimation to the appellant ; as the effect of a judgment dismissing the appeal cannot be removed except on an appeal to the House of Lords. If the respondent or any other party wishes it, he may have authority to go on, and print, and insist in the appeal, as if he had taken it himself. The statute, however, does not seem to contemplate that it is to be made absolutely necessary for the respondent to appear at the enrolment for determining what is to be printed.(g)

12. Powers of Court of Session.—The appeal submits to the review of the Court of Session all the interlocutors pronounced in the cause. There is no necessity for any counter appeal, and the Court may alter any interlocutor, in any manner, at the instance of any party, so as to enable it to do complete justice in the cause. This provision does away with the necessity which existed formerly for an appellant or respondent pointing out in his advocacy, or by counter advocacy, the special interlocutors complained of, and the special remedies desired.(h)

13. Hearing, Proof, and Judgment.—In deciding the cause, the Court must apply the law applicable to the circumstances, whether it has been pleaded or not—a provision which has been introduced to prevent the necessity of having to add to or amend the record where the facts were sufficiently stated.(i) In their judgment the Court must distinguish, in cases in which proof has been taken, how far they proceed upon matter of fact, and how far upon matter of law,—their de-

(g) 31 and 32 Vict. c. 100, § 71.(h) *Ib.*, § 69.

(i) 31 and 32 Vict. c. 100, § 72.

Respondent failing to Appear—Appellant withdrawing Appeal, &c.

cision on the former not being liable to review by the House of Lords.^(k) They must also dispose of the matter of expenses. A general finding of expenses to be due, includes those incurred both in the Court of Session and in the Inferior Court.^(l)

If the cause, when it comes to be heard, is not, in the opinion of the Court, ripe for judgment, they may order proof, or additional proof, to be taken in the appeal. This proof must be taken in the way in which proofs are taken in the Inner-House.⁽ⁿ⁾

The Court has also power to amend the record at any time, on such conditions as to expenses as they may think proper.⁽ⁿ⁾

14. Respondent failing to Appear.—Should the respondent not appear at the hearing, it is not clear what course should be followed. Under the old forms, where an appellant found caution for the expenses in the Court of Session, there was probably never much hardship in insisting upon the respondent defending the judgment, but the case now is somewhat altered. It is, however, not the practice of the Court of Session to hear causes *ex parte*, and unless the provision that the Court shall decide “the merits of the cause on the law truly applicable in the circumstances” apply to this case, there is no positive provision for it in the Court of Session Act.

15. Appellant withdrawing Appeal.—Should the appellant withdraw from the appeal, any other party in the cause may insist in the appeal in the same manner as if he himself had brought the case to the Superior Court.^(o)

16. Possession Pending Appeal.—Until the appeal comes on for hearing before the Court of Session, the Sheriff-Court is to regulate all matters relating to interim possession. In doing this the Sheriff-Court is directed to have regard to the manner

(k) 6 Geo. IV. c. 120, § 40.

(n) 31 and 32 Vict. c. 100, § 72.

(l) *Halbert v. Bogie*, 28 May 1857,
19 D. 762.(o) *Ib.*, § 69.

Appeals for Review.

in which the interests of the parties may be affected by the final decision. Any interim order on this point is not subject to review until the cause comes to be heard; and then it will be for the Court of Session to make all such regulations for interim possession as they find right.(p)

APPEALS NOT FOR REVIEW.

17. **Appeal on Case Stated.**—Where both the parties in any Sheriff-Court cause (irrespective of its value) are at one as to the facts, and concur in desiring to have the opinion of the Court of Session on any question of law, it is competent to them to present to one of the Divisions of that Court a special case, setting forth (1) the facts upon which they are agreed; and (2) the question of law thence arising upon which they desire to obtain the opinion of the Court. This may be done at any stage of the cause, and the case may be framed either in such a way as to settle only the law point, or so as to render any farther proceedings in the Sheriff-Court unnecessary, for it may set forth alternatively the judgment which the parties desire to have pronounced according to either view of the question of law which the Court of Session may take. The case is to be signed by counsel. When enrolled in the Division, the Court of Session may order any documents to be printed, and they are to hear parties in the quickest manner, and then give their opinion, or pronounce judgment. They have power to appoint the case to be reheard before seven judges. The Court of Session decision is appealable to the House of Lords, unless (by special consent) the parties agree that the decision is not to be so reviewed.(q)

18. **Appeal for Jury Trial.**—When more than £40 is claimed in any Sheriff-Court action, and a proof has been allowed, the pursuer or defender may appeal to the Court of Session with the view of having the case tried by jury.(r)

The claim must be in amount above £40. If it be not

(p) *Ib.*, § 79.

(q) 81 and 82 Vict. c. 100, § 63.

(r) 81 and 82 Vict. c. 100, § 73 (*App. cccii*).

Appeal for Jury Trial.

simply pecuniary, the party intending to advocate must petition the Sheriff for leave; and, after intimating the petition to the opposite party or his agent, must, if required by the Sheriff, give his solemn declaration that the claim is of the true value of £40 and upwards. If the Sheriff be satisfied in regard to this, leave to appeal shall be granted.(s)

An order for proof must have been pronounced. The proof may be in regard only to part of the cause, or it may be a proof "before answer,"(t) but the appeal will not be competent if the proof be one to lie *in retentis*, or be merely a diligence for the recovery of documents,(u) or if it be a proof limited to writ or oath.(v)

The appeal for trial by jury is by note of appeal under the Act of 1868.(x) It does not appear to have been intended to make the times for ordinary appeals applicable to this. Unless parties agree to go on sooner with the proof, they are entitled, where this appeal is competent, to a delay of fifteen days between the granting and the time of commencing to take proof, for the purpose of considering whether they will have the case tried by jury or not.(y)

The proceedings in the Court of Session begin in the same way as in an ordinary appeal, but the case may be remitted to a Lord Ordinary.(z) The Court are not bound to send the case to a jury, but may dispose of it as it seems best to them, because the whole case is brought before them for review.(a) The party appealing for jury trial can hardly say that he thinks proof unnecessary; but he may apply to have the proof taken in any manner competent in the Court of Session.(b) The re-

(s) 6 Geo. IV. c. 120, § 40; A. S. 11 July 1828, § 5.

(t) *Stewart v. Rutherford*, 19 July 1862, 24 D. 1442.

(u) A. S. 1828, *ut supra*.

(v) *Primrose v. M'Kenzie*, 18 Nov. 1859, 22 D. 1.

(z) *Ib.*, § 78.

(y) A. S. 10 July 1839, § 126. In

Orkney and Shetland the time is thirty days.

(s) 31 and 32 Vict. c. 100, § 73. Should the case be tried by a jury on circuit, the Sheriff-Court agent may conduct the cause there. *Ib.*, § 50.

(a) *Campbell v. Campbell*, 21 Nov. 1846, 9 D. 135.

(b) *Sands v. Meffan*, 20 Jan. 1829, 7 S. 290.

Appeals not for Review.

spondent is not barred in any way from maintaining any of his pleas.

19. Appeal on Contingency.—When there are two actions, one in the Court of Session and one in the Sheriff-Court, so connected with each other that had they both been in the Inferior Court they would have been conjoined, the action in the Inferior Court may be removed to the higher Court, and conjoined with, or conducted along side of, the action there depending. The circumstances in which it is proper that actions should be conjoined have already been considered.(c) When a party desires to remove an action on this ground of “contingency,” to the Court of Session, he must get from the sheriff-clerk a certified copy of the pleadings that have been lodged, and of the interlocutors pronounced in the cause. This copy he must lay before the Lord Ordinary, or before the Division before which the Court of Session process is depending. If, upon consideration of this, the Lord Ordinary or Court think that there is contingency between the processes, a warrant may be granted to enable the sheriff-clerk to transmit the Inferior Court process to the Superior Court.(d) The decision of the Lord Ordinary or of the Court is final, but if the motion be refused, it may be renewed at a subsequent stage.(e)

CHAPTER III.

OF SUSPENSIONS AND REDUCTIONS.

SUSPENSIONS.

1. *When Suspension competent.*
2. *Proceedings in Suspension.*

REDUCTIONS.

3. *When Reduction competent.*
 4. *Proceedings in Reduction.*
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SUSPENSIONS.

- 1. When Suspension competent.**—After extract, review by

(c) *Supra*, pp. 167, 168.

(e) 31 and 32 Vict. c. 100, § 75.

(d) 31 and 32 Vict. c. 100, § 74 (App. ccxii).

When Suspension Competent.

presenting an appeal becomes incompetent; but in certain cases may still be obtained by presenting a note of suspension.

The £25 limit of value applies to suspension as well as to appeals, and under the same restrictions.(a)

Suspension is competent where the decree of the Sheriff-Court contains any order for the payment of money—not being expenses (b)—or for the performance of any act, on which execution is competent against the property or person of the debtor.(c) Interim decrees for payment of money may be suspended in the same way as final decrees; and, although it is expressly provided that no other kind of interim decree can be reviewed until the final judgment has been given,(d) the Court of Session have held that they were entitled, when they saw cause, to suspend execution of a decree *ad factum præstandum* till such time as the complainer could competently bring the merits before them.(e) The reasons for this decision apply equally to the case of an interim interdict being granted;(g) for the consequences of ordering a person not to do a thing may be as injurious as an order obliging him to do something.

Suspension is also the proper mode of review in actions where the extract is issued without giving time to appeal, and in those cases where the warrant issues at once. To the first class belong removings and ejections;(h) and to the second, warrants pronounced in petitions for lawburrows;(i) against a servant deserting his service;(k) and against an absconding debtor.(l)

Suspension is incompetent where the debtor has implemented

(a) 16 and 17 Vict. c. 80, § 22, *supra*, Chap. II., art. 1, p. 354.

(b) *Simpson v. Young*, 8 July 1852, 14 D. 990.

(c) *Shand's Practice in the Court of Session*.

(d) 16 and 17 Vict. c. 80, § 24 (App. lxxx).

(e) *Wilson v. Bartholomew*, 7 July 1860, 22 D. 1410.

(g) Where interdict *ad interim* is refused, the complainer can (at no great loss) practically obtain a review of the decision by abandoning the proceedings before the Sheriff-Court, and renewing them before the Court of Session.

(h) 6 Geo. IV. c. 120, § 44.

(i) See *supra*, p. 283.

(k) See *supra*, pp. 287-8.

(l) Cases cited *supra*, Part III, Chap. II, Section XVIII.

 Reductions.

the decree, even in those cases in which suspension is otherwise the appropriate mode of appeal. In this connection, implement is used in its ordinary sense, and not in the restricted sense in which it is used in reference to reponing against decrees pronounced in absence. Where the debtor is in prison, the suspension is called a suspension and liberation; and the implement which precludes suspension occurs only where a debtor neglects to complain to the Court of Session till the creditor has obtained everything the decree gives him on the merits of his case.(n)

2. Proceedings in Suspensions.—The suspension is presented in the Bill Chamber of the Court of Session, and the suspender in the ordinary case is bound to find caution there to implement the decree, and for expenses, before he will be allowed to proceed. The case is conducted under the forms of process in use in the Court of Session.(o)

 REDUCTIONS.

3. When Reduction competent.—Where suspension is incompetent, but only there, there is still the remedy of reduction. Such a case occurs when a decree of absolvitor with expenses has been pronounced.(p) The £25 limit of value is still applicable.(q) There seems no limit as to time, but there should be no undue or avoidable delay.

4. Proceedings in Reduction.—The pursuer of the action is not bound to find caution. The conclusion, which is framed with the usual superfluity of technical terms, asks to have the Sheriff-Court proceedings quashed. The action is conducted in all respects like any other action of reduction in the Court of Session.

(n) *M'Dougall v. Gall*, 30 June 1863, 1 Macph. 1612.

(o) 1 and 2 Vict. c. 86; A. S. regulating proceedings in Bill Chamber, 24 Dec. 1838; 31 and 32 Vict. c. 100, § 90.

(p) *White v. Vallance*, 14 Feb. 1835, 18 S. 470.

(q) 16 and 17 Vict. c. 80, § 22, *supra* Chap. II, Section 1, art. 1, p. 354.

CHAPTER IV.

OF REVIEW OF SMALL DEBT COURT DECISIONS.

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| <p>1. <i>What Review competent.</i>
 2. <i>Reviewing Tribunal.</i>
 3. <i>Mode of taking Appeal.</i></p> | <p>4. <i>Jurisdiction of Statutory Tribunal privative.</i></p> |
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1. *What Review competent.*—The right of review in the Small Debt Court is of a limited kind. There is no review upon the merits, whether the decision be wrong in point of fact or in point of law. (a) The review is limited to complaints founded—(1) on the ground of corruption or malice and oppression on the part of the Sheriff; (2) on such deviations in point of form from the statutory enactments as the reviewing Court shall think took place wilfully, or prevented substantial justice from having been done; and (3) on incompetency, including defect of jurisdiction of the Sheriff. (b)

2. *Reviewing Tribunal.*—The provisions of the Small Debt Act as to the grounds on which review is competent, are very much the same as those which the common law would have made had there simply been a provision that the judgment of the Sheriff-Court should be final; but the Act goes farther, and provides a special reviewing tribunal. The person conceiving himself aggrieved must bring the case by appeal before the next Circuit Court of Justiciary, or, where there are no Circuit Courts, before the High Court of Justiciary. (c)

3. *Mode of taking Appeal.*—The appeal may be taken in open Court at the time of pronouncing decree, or at any time thereafter, within ten days. The appeal is in writing, and must be lodged in the hands of the clerk of Court. Within the same time a copy must be served on the opposite party, or at his dwelling-place, or on his agent. This service obliges the re-

(a) 1 Vict. c. 41, § 30 (App. clvii).
 (b) *Ib.*, § 31.

(c) 1 Vict. c. 41, § 31.

 Jurisdiction of Statutory Tribunal Privative.

spondents to appear at the first Circuit Court or High Court (as the case may be), held at least fifteen days after such service. The appellant, on entering the appeal, must lodge a bond, signed by a sufficient cautioner, that he will abide by the judgment of the Justiciary Court, and pay such costs as it shall award. The sheriff-clerk is answerable for the sufficiency of this cautioner. If there are any documents which have been used in evidence in the Small Debt Court, and which the appellant desires to use in the Circuit Court, he must ask the Sheriff to initial them; and, in the same way, he must ask the Sheriff to write on the principal summons the name of any witness examined in the cause, to whose evidence he intends to refer.

The Circuit Court may remit ("certify") the case to the High Court of Justiciary.(d)

4. Jurisdiction of Statutory Tribunal privative.—The jurisdiction thus conferred on the Justiciary Court is privative, and any person aggrieved by the decree of the Sheriff in the Small Debt Court can appeal only to this Court. It has frequently been decided that the Court of Session has no jurisdiction in such cases.(e) A distinction, however, has been taken between the case of a complaint against the decree, and a complaint against something done subsequently to the decree; and it has been held that jurisdiction has not been restricted to the statutory tribunal to deal with the latter case. Thus, where a party who admitted the Sheriff's decree to be correct, but alleged that the sheriff-clerk had altered the extract after issuing it, and had, without any authority, inserted a larger sum, the Court of Session held that they had power to reduce the vitiated extract of the decree.(g)

(d) 1 Vict. c. 41, § 31; 20 Geo. II, c. 43, §§ 34, 35 and 36 (App. ccvii).

281; *Miller v. Henderson*, 2 Feb. 1850, 12 D. 656, 12 D. 656.

(e) *Graham v. Mackay*, 18 March 1848, 6 Bell's App. Ca. 214; *Lowden's Trustees v. Patullo*, 17 Dec. 1846, 9 D.

(g) *Murchie v. Muirbairn*, 22 May 1863, 1 Macph. 800. See *Scott v. Latham*, *supra*, p. 381, note (v).

Debts Recovery Court.

CHAPTER V.

OF SPECIAL PROVISIONS FOR REVIEW.

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| 1. <i>Debts Recovery Court.</i> | | 3. <i>Other Special Provisions for Review.</i> |
| 2. <i>Process of cessio honorum.</i> | | |

1. Debts Recovery Court.—In the Debts Recovery Court special provisions are made for regulating appeals. It affords the only instance in which it is necessary to appeal from the Sheriff-Substitute to the Sheriff before going to the Court of Session. Where the cause exceeds the value of £25 sterling, either party may appeal from the Sheriff's judgment to either of the Divisions of the Court of Session. The appeal must be taken within eight days, or, in cases from Orkney and Shetland, within sixteen days, and is taken by ingrossing on the interlocutor sheet a note of appeal signed by the appellant or his agent. The sheriff-clerk must forthwith transmit the process to one of the principal clerks of the Division. After this has been done, the appellant must (within ten days if the Court is sitting, or on the third day of its next session) enrol the cause by written note. This enrolment he must intimate by letter to the respondent or his agent; and, on the cause being called, the Court give such orders as to printing papers as they think fit; and then the case is sent to the Summary Debate Roll. When the case is heard, the Court of Session has power to order the evidence to be taken anew, or additional evidence to be taken by the Sheriff or Sheriff-Substitute, with such directions as shall seem right. If they do not think this necessary, they may affirm, or alter, or pronounce such other judgment as shall seem just. They may either remit to the Sheriff to decern anew—so that the decree may be extracted from the Sheriff-Court,—or pronounce a decree extractable in the Supreme Court.(a)

(a) 30 and 31 Vict. c. 96, §§ 12, 13, and 14 (App. clxxxii).

Other Special Provisions for Review.

2. Process of Cessio Bonorum.—In the process of *cessio bonorum* the appeal is by a reclaiming note lodged with one of the clerks of either Division of the Court of Session. The note embodies the judgment or judgments complained of, and must be presented within ten days from the date of the last of those judgments.(b) A copy of the note must, within the same period, be delivered to the respondent or his agent.(c) On production to him of a copy of the note certified by a clerk of the Court of Session, the sheriff-clerk must transmit the process. The reclaiming note is not competent except against an interlocutor granting or refusing *cessio*, either conditionally or unconditionally.(d)

When the Court of Session is not sitting, the reclaiming note must be brought before the Lord Ordinary on the Bills, who must forthwith dispose of it. The Lord Ordinary's judgment is subject to review of the Inner-House. If he has not finished the disposal of the case when the Court meets, they take the case up at the stage to which he has brought it.(e)

3. Other Special Provisions for Review.—The modes of appealing against decisions pronounced in applications for the Service of Heirs,(g) and under the Ecclesiastical Buildings and Glebes Act,(h) and under the Entail Amendment Act,(i) have been noticed in connection with the subjects themselves.

(b) Twenty days in the case of Orkney.

(c) *M'Kinney v. Van Heck*, 19 March 1864, 2 Macph. 889.

(d) 6 and 7 Will. IV. c. 56, § 8 (App. cv); and see *Galbraith v. Ritchie*, 6 Dec. 1856, 19 D. 136.

(e) 6 and 7 Will. IV. c. 56, § 10.

(g) *Supra*, p. 311, art. 7.

(h) *Supra*, p. 270, art. 4.

(i) *Supra*, p. 275, art. 9.

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21. [*Transference of Admiralty Jurisdiction.*].—And whereas all maritime causes may now be brought by review before the Court of Session, and many causes formerly heard and determined by the High Court of Admiralty are now remitted to the Jury Court: And whereas the Court of Justiciary holds a cumulative jurisdiction with the High Court of Admiralty as to all crimes competent to be tried by the High Court of Admiralty: And whereas it has become unnecessary and inexpedient to maintain any separate court for maritime or admiralty causes; be it therefore enacted that the High Court of Admiralty be abolished, and that hereafter the Court of Session shall hold and exercise original jurisdiction in all maritime civil causes and proceedings of the same nature and extent in all respects as that held and exercised in regard to such causes by the High Court of Admiralty before the passing of this Act; and all applications of a summary nature connected with such causes may be made to the Lord Ordinary on the Bills: Provided always that all such causes, not exceeding the value of twenty-five pounds sterling, shall be instituted and carried on in the first instance before an inferior court, in the manner directed and with the exceptions specified in an Act of the Parliament of *Scotland*, passed in the year sixteen hundred and seventy-two, intituled *An Act concerning the regulation of the judicatories.* (1672, c. 40.)

22. [*Sheriffs to have jurisdiction in maritime causes.*].—And be it enacted that the Sheriffs of *Scotland* and their substitutes shall, with-

Judicial Establishments Act, 1830.

in their respective sheriffdoms, including the navigable rivers, ports, harbours, creeks, shores, and anchoring grounds in or adjoining such sheriffdoms, hold and exercise original jurisdiction in all maritime causes and proceedings, civil and criminal, including such as may apply to persons residing furth of Scotland, of the same nature as that heretofore held and exercised by the High Court of Admiralty.*

23. [*Maritime causes to be tried in same manner as other causes.*—And be it enacted that the finding of caution and using of arrestment heretofore observed in the High Court of Admiralty, and all regulations relative thereto, may be enforced in the foresaid courts respectively; and maritime causes may be heard and determined by the Sheriff according to the same modes and rules which are applicable in the Sheriff-court to causes not maritime, including the mode prescribed in an Act passed in the tenth year of the reign of his late majesty King George the Fourth, intituled *An Act for the more effectual recovery of small debts, and for diminishing the expenses of litigation in causes of small amount in the Sheriff-courts in Scotland* (10th Geo. IV., c. 55); and the sentences, interlocutors, and decrees pronounced by Sheriffs in maritime causes shall be subject to review by the Courts of Session and Justiciary respectively, in the same way and manner in which sentences, interlocutors, and decrees of Sheriffs in similar causes not maritime are subject to review at present, and not otherwise: Provided always that it shall not be competent to the Sheriff to try any crime committed on the seas of a nature which it would not be competent for that judge to try if the crime had been committed on land.

24. [*Provision when counties are separated by water.*—And be it enacted that where counties are separated from each other by a river, or by a firth or estuary, the Sheriffs of the counties adjoining to the sides thereof shall have a cumulative jurisdiction over the whole intervening space so occupied by water: Provided always that the pursuer of all civil cases shall, where such cumulative jurisdiction applies, bring the cause before the Sheriff of that county within which the defender may reside; and it is provided that where there are several defenders in the same cause, residing in different counties, the same rules shall apply in regard to the citation of the whole of such defenders before the same Sheriff-court, which are observed in similar circumstances with respect to causes not maritime; and it is provided farther that Sheriffs shall respectively have power to remit such

* Explained by 1 & 2 Vict., c. 119, § 21, *infra*, p. xxvii.

 11 Geo. IV., & 1 Will. IV., c. 69.

causes from their own court to that of another Sheriff *ob contingentiam*, or for other sufficient cause.

27. [*Sheriff-clerks to act as clerks to Sheriffs in maritime causes.*]
—And be it enacted that the sheriff-clerks of the several counties of *Scotland* shall respectively act as clerks to the Sheriffs in maritime causes; provided always that neither that officer, nor any other person appointed to any office, or acquiring right to any fees or emoluments in virtue of the provisions of this Act, shall be entitled to prefer any claim to compensation in consequence of the subsequent abolition of such office or fees, or of any alteration therein.

31. [*Jurisdiction of Commissary Court of Edinburgh restricted.*]
—And be it enacted that the Commissary Court of *Edinburgh* shall possess and exercise the same and no other jurisdiction in the sheriffdom of *Edinburgh* than that possessed and exercised by Sheriffs being commissaries in other sheriffdoms of *Scotland*; and that any jurisdiction of a more extensive nature heretofore possessed or exercised by the Commissary Court of *Edinburgh* shall entirely cease, save and except such as may regard the granting of confirmation of testaments of persons dying furth of *Scotland*, having personal property in *Scotland*, which jurisdiction is hereby reserved to the said court.

32. [*Actions of aliment.*].—And it is further enacted that actions of aliment may be instituted, heard, and determined in any Sheriff-court of *Scotland*.

23. [*Consistorial actions to be instituted in the Court of Session.*]
—And be it enacted that, all actions of declarator of marriage, and of nullity of marriage, and all actions of declarator of legitimacy and of bastardy, and all actions of divorce, and all actions of separation *à mensâ et thoro*, shall be competent to be brought and insisted on only before the Court of Session.*

* The Act 13 & 14 *Vict.*, c. 36 (to facilitate procedure in the Court of Session), enacts:—

16. [*Actions of adherence, &c., to be instituted in the Court of Session.*]
—And be it enacted and declared that all the provisions of the said recited Act passed in the session of Parliament holden in eleventh

year of the reign of His Majesty King George the Fourth, and the first year of the reign of his Majesty King William the Fourth, and of this Act, applicable to actions of declarator of marriage, and of nullity of marriage, and to actions of declarator of legitimacy and of bastardy, and to actions of

 Interpretation Act, 1837—7 Will. IV., & 1 Vict., c. 39.

7 Will. IV., & 1 Vict., c. 39.—An ACT to interpret the words “Sheriff,” “Sheriff-Clerk,” “Shire,” “Sheriffdom,” and “County,” occurring in Acts of Parliament relating to Scotland.—12th July 1837.

“Whereas it is expedient that the words ‘sheriff,’ ‘sheriff-clerk,’ ‘shire,’ ‘sheriffdom,’ and ‘county,’ used in Acts of Parliament relating to Scotland, should be interpreted in manner hereinafter mentioned:” Be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that in all cases in which the words “sheriff,” “sheriff-clerk,” “shire,” “sheriffdom,” and “county” occur in any existing Act of Parliament, or shall occur in any future Act relating to Scotland, the word “sheriff” shall be deemed and taken to comprehend and apply to any steward, the words “sheriff-clerk” to comprehend “steward-clerk,” and the words “shire,” “sheriffdom,” and “county” to comprehend and apply to any stewartry in Scotland, excepting where otherwise specially provided, and excepting cases in which there is anything in the subject or context repugnant to such meaning and application.*

1 & 2 Vict., c. 114.—An ACT to amend the Law of Scotland in matters relating to Personal Diligence, Arrestments, and Poindings.—16th August 1838.

Whereas it is expedient to improve the form and to diminish the expense of the diligence of the law in *Scotland* against the persons of debtors, and to amend the law as to the diligence of arrestment and poinding: Be it therefore enacted by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same:—

[*Extracts of Court of Session, Teind Court, and Court of Justiciary*

divorce, and to actions of separation *à mensâ et thoro*, are and shall be applicable to actions of adherence,

and all other consistorial actions, though not specially mentioned in the said recited Act.

* As to the general interpretation of all Acts of Parliament, *see* 18 Vict., c. 21.

decrees to contain warrant to arrest, charge, and poind..]—That from and after the thirty-first day of December One thousand eight hundred and thirty-eight, where an extract shall be issued of a decree or Act pronounced or to be pronounced by the Court of Session, or by the Court of Commission for Teinds, or by the Court of Justiciary, or of a decree proceeding upon any deed, decree-arbitral, bond, protest of a bill, promissory-note, or banker's note, or upon any other obligation or document on which execution may competently proceed, recorded in the books of Council and Session or of the Court of Justiciary, the extractor shall, in terms of the schedule (Number 1) hereunto annexed (or as near to the form thereof as circumstances will permit), insert a warrant to charge the debtor or obligant to pay the debt or perform the obligation within the days of charge, under the pain of poinding and imprisonment, and to arrest and poind, and for that purpose to open shut and lockfast places; which extract shall be subscribed and prepared in other respects as extracts are at present subscribed and prepared, and for which extract no higher fees shall be exigible than those which are payable as by law established.

2. [*Competent to arrest.*.]—And be it enacted that it shall be lawful by virtue of such extract to arrest in like manner as if letters of arrestment on liquid grounds of debt or letters of horning containing warrant to arrest had been issued under the signet.

3. [*Competent to charge. Officer's execution.*.]—And be it enacted that it shall be lawful by virtue of such extract to charge the debtor or obligant therein mentioned to pay the sums of money or to perform the obligation therein specified within the days of charge, from and after the date of charge, under the pain of poinding and imprisonment; and the officer executing the same shall return an execution in terms of the schedule (Number 2) hereunto annexed, or as near to the form thereof as circumstances will permit.

4. [*Competent to poind.*.]—And be it enacted that on the expiration of the days of charge it shall be lawful, by virtue of such extract, to poind the moveable effects of the debtor in payment of the sums of money therein mentioned, as if letters of poinding or letters of horning containing warrant to poind had been issued, and for that purpose to open shut and lockfast places.

5. [*Execution to be registered; and to have the effect of denunciation, and to accumulate interest.*.]—And be it enacted that it shall be competent at any time within year and day after a charge has expired to present such extract and execution of charge to the keeper of the General Register of Hornings at Edinburgh, and the keeper

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shall thereupon record the execution in that register, and state therein the name and designation of the person by whom the extract and execution were presented, and also the date of presentation; which registration shall have the same effect as if the debtor or obligant had been denounced rebel in virtue of letters of horning, and the said letters, with the executions of charge and denunciation, had been recorded according to the forms now in use, and shall have the effect to accumulate the debt and interest into a capital sum, whereon interest shall thereafter become due.

6. [*Extract and execution with certificate of registration to be presented in the Bill Chamber for warrant to imprison.*].—And be it enacted that on the execution being so recorded the keeper of the register shall write upon the extract and upon the execution (if it be written on paper apart) a certificate of the registration thereof in terms or to the effect of the schedule (Number 3) hereunto annexed, which he shall date and subscribe; and if warrant to imprison be required, a writer to the signet shall indorse and subscribe on the extract a minute to the effect of the schedule (Number 4) hereunto annexed (or as near to that form as circumstances will permit), and the extract, with the execution and certificate of registration and indorsed minute, shall be presented in the Bill Chamber of the Court of Session, and the clerk thereof shall, if there be no lawful cause to the contrary, write on the extract this deliverance, "*Fiat ut petitur*," and shall date and subscribe the same; and it shall be lawful by virtue of the said extract and deliverance to search for, take, apprehend and imprison the debtor or obligant, and, if necessary for that purpose, to open shnt and lockfast places; and magistrates and keepers of prisons are hereby authorised and required to receive into and detain in prison the person of the debtor or obligant till liberated in due course of law, in like manner as if letters of caption had been issued under the signet.

7. [*Execution at the instance of a person acquiring right to extract.*].—And be it enacted that where any person shall acquire right to an extract of a decree or act issued as aforesaid it shall be competent to him to present in the Bill Chamber the extract, with the execution of charge (if a charge shall have been given), and certificate of registration (if the same shall have been registered), and a minute indorsed thereon, in the form of the schedule (Number 5) hereunto annexed (or as near thereto as circumstances will permit), subscribed by a writer to the signet, with the assignation, confirmation, or other legal evidence of such acquired right, praying for authority (as the

1 & 2 Vict., c. 114.

case may be) to arrest, charge, poind the effects of, or (as the case may be) to imprison the said debtor or obligant, and open shut and lockfast places; and the clerk shall, if there be no lawful cause to the contrary, write on the extract this deliverance, "*Fint ut petitur*," and he shall date and subscribe the same, and indorse the same date on the documents produced, and subscribe with his initials the date so indorsed; and the extract with such deliverance shall be a warrant to arrest, charge, poind, and open shut and lockfast places, or (as the case may be) to search for, take, apprehend, and imprison as aforesaid, at the instance of such person.

8. [*Letters of horning may be issued as formerly, but no expenses exigible. Extracts in terms of this Act may be obtained where extracts issued prior to its commencement.*].—And be it enacted that nothing herein contained shall prevent any person from obtaining extracts, and also letters of horning, poinding, and arrestment, or letters of arrestment and letters of caption, according to the former law and practice, if he shall see fit to proceed in that way, in place of in the manner hereby provided; but it is hereby declared that in such case no part of the expenses thereof, except the expenses of the extract, shall be exigible from the debtor or obligant, or his estate, unless it be shown that it is incompetent to proceed in the way herein provided; and where an extract has been issued before the commencement of this Act it shall be competent for the person in whose favour such extract has been issued, or the person having right thereto, to obtain an extract in terms of this Act, or a warrant subjoined to the former extract in terms of the said schedule (Number 1), and to prosecute diligence thereon agreeably to the provisions hereof.

9. [*Extracts of Sheriff's decrees, &c., to contain warrant to arrest, charge, poind, and open shut and lockfast places.*].—And be it enacted that from and after the said thirty-first day of December, where an extract shall be issued of any decree or act pronounced or to be pronounced by any Sheriff, or of a decree proceeding upon any deed, decree-arbitral, bond, protest of a bill, promissory-note, or banker's note, or upon any other obligation or document on which execution may competently proceed, recorded in the Sheriff-court books, the extractor shall, in terms of the schedule (Number 6) hereunto annexed (or as near thereto as circumstances will permit), insert therein a warrant to charge the debtor or obligant to pay the debt or perform the obligation within the days of charge, under the pain of poinding and imprisonment, and to arrest and poind according to the present practice, and, if need be for the purpose of poinding, to open shut and lockfast

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places ; which extract shall be subscribed and prepared, in other respects as extracts are at present subscribed and prepared, and for which extracts no higher fees shall be exigible than those which are payable as by law established ; and where an extract has been issued from the books of the Sheriff before the commencement of this Act it shall be competent for the person in whose favour such extract has been issued, or the person having right thereto, to obtain an extract in terms of this Act, or a warrant subjoined to the former extract in terms of the said schedule (Number 6), and to prosecute diligence thereon agreeably to the provisions hereof.

10. [*Execution to be registered, and to accumulate interest.*].—And be it enacted that it shall be lawful by virtue of such extract to charge the debtor or obligant therein mentioned to pay the sums of money or to perform the obligation therein specified within the days of charge, under pain of poinding and imprisonment, and the officer executing the same shall return an execution in terms of the said schedule (Number 2), or as near to the form thereof as circumstances will permit : and it shall be competent at any time within year and day after a charge has expired to present the extract and execution of charge to the clerk of the Sheriff-court from which the extract has been issued, who shall thereupon record the execution in the register of hornings kept by him, and state therein the name and designation of the person by whom the extract and execution were presented, and the date of presentation ; which registration shall have the same effect as if the debtor or obligant had been denounced rebel in virtue of letters of horning, and the said letters with the executions of charge and denunciation had been recorded according to the forms now in use, and shall have the effect to accumulate the debt and interest into a capital sum whereon interest shall thereafter become due.

11. [*Extract and execution with certificate of registration to be presented in Sheriff-court for warrant to imprison.*].—And be it enacted that on the execution being so recorded the sheriff-clerk shall write upon the extract and upon the execution (if it be written on paper apart) a certificate of the registration thereof, which he shall date and subscribe, in terms of the schedule (Number 7) hereunto annexed (or as near thereto as circumstances will permit) ; and if warrant to imprison be desired, the creditor or a procurator of court shall indorse and subscribe on the said extract a minute in the terms of the schedule (Number 8) hereunto annexed (or as near to that form as circumstances will permit) ; and the said clerk shall, if there be no lawful cause to the contrary, write on the extract this deliver-

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ance, "*Fiat ut petitur*," and shall date and subscribe the same; and it shall be lawful by virtue of the said extract and deliverance to search for, take, apprehend, imprison, and, if necessary for that purpose, to open shut and lockfast places as aforesaid; and magistrates and keepers of prisons are hereby authorised and required to receive into and detain in prison the person of the debtor or obligant till liberated in due course of law, in like manner as if letters of caption had been issued under the signet.

12. [*Execution at the instance of a person acquiring right to the extract.*—And be it enacted that where any person has acquired right to an extract of a decree or act of the Sheriff he may present to the sheriff-clerk the extract, with the execution of charge (if a charge shall have been given), and certificate of registration (if the same shall have been registered), and a minute indorsed on the extract in the form of the schedule (Number 9) hereunto annexed (or as near thereto as circumstances will permit), subscribed by him or a procurator of court, with the assignation, confirmation, or other legal evidence of the acquired right, praying for authority (as the case may be) to arrest, charge, poind the effects of, or (as the case may be) to imprison the said debtor or obligant, and open shut and lockfast places; and the clerk shall, if there be no lawful cause to the contrary, write on the extract this deliverance, "*Fiat ut petitur*," and he shall date and subscribe the same, and indorse the same date on the documents produced, and subscribe with his initials the date so indorsed; and the extract, with such deliverance, shall be a warrant to arrest, charge, poind, and open shut and lockfast places, or (as the case may be) to search for, take, apprehend, and imprison as aforesaid, at the instance of such person.

13. [*Warrant of concurrence to charge, arrest, and poind.*—And be it enacted that where a debtor or obligant is or his moveables are within the territory of any other Sheriff than the Sheriff from whose books such extract shall be lawfully issued, it shall be competent to present the extract in the Bill Chamber of the Court of Session, or in the court of the Sheriff within whose jurisdiction the debtor or obligant is, or his moveables are, with a subscribed minute indorsed thereon in terms of the schedule (Number 10) hereunto annexed (or as near thereto as circumstances will permit), praying for the authority and concurrence of the Lords of Council and Session, or of the said Sheriff (as the case may be), to arrest, charge, and poind the moveables of the said debtor or obligant, and to open shut and lockfast places, all in terms of the warrant in the said extract; and if there be

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no lawful cause to the contrary, the clerk in the Bill Chamber, or the sheriff-clerk (as the case may be) shall grant authority accordingly by writing this deliverance, "*Fiat ut petitur*," and dating and subscribing the same; and it shall thereupon be lawful to arrest, charge, pound, and open shut and lockfast places, in the same manner as if the said extract had been originally issued from the books of the Court of Session or concurring Sheriff.

14. [*Warrant by concurring sheriff-clerk to imprison.*].—And be it enacted that where the debtor or obligant shall have been charged on a warrant of concurrence and the execution recorded in the books of the concurring court, the extract and execution, with the certificate of registration, and a minute in terms of the said schedule (Number 4) hereunto annexed (or as near thereto as circumstances will permit) indorsed thereon, may be presented either in the Bill Chamber, subscribed by a writer to the signet, or in the court of the concurring Sheriff, subscribed by a procurator of court, praying for authority to imprison as aforesaid; and if there be no lawful cause to the contrary, the Bill Chamber clerk or sheriff-clerk (as the case may be) shall grant authority accordingly by writing thereon this deliverance, "*Fiat ut petitur*," dating and subscribing the same; and it shall thereupon be lawful to open shut and lockfast places, search for, take, apprehend, and imprison, in manner hereinbefore provided.

15. [*Concurrence to warrant of imprisonment granted in another Sheriff-court.*].—And be it enacted that where a warrant to imprison has been granted by any Sheriff in manner hereinbefore provided, and where the debtor or obligant is within the territory of another Sheriff, such warrant may be presented, along with the extract, execution of charge, and certificate of registration, either in the Bill Chamber or in such other Sheriff-court, and a minute in terms or to the effect of the said schedule (Number 10) praying for the authority and concurrence of the Lords of Council and Session or of the said Sheriff-court for executing the said warrant; and if there be no lawful cause to the contrary the clerk in the Bill Chamber or the sheriff-clerk (as the case may be) shall grant authority accordingly by writing this deliverance, "*Fiat ut petitur*," and dating and subscribing the same; and it shall thereupon be lawful to open shut and lockfast places, search for, take, apprehend, and imprison, in the same manner as if the said warrant had been originally granted by the Court of Session or the concurring Sheriff.

16. [*Warrant to arrest may be introduced into summonses before the Court of Session.*].—And be it enacted that from and after the said

1 & 2 Vict., c. 114.

thirty-first day of *December* it shall be lawful to insert in summonses raised before the Lords of Council and Session concluding for payment of money a warrant (or will) to arrest the moveables, debts, and money belonging or owing to the defender until caution be found acted in the books of Council and Session, that the same shall be made forthcoming as accords of law; and it shall be lawful to writers to the signet to subscribe and to the keeper thereof and his deputies to affix the signet to such summonses without any other authority than this Act.

17. [*Arrestment may be executed before executing the summons, but the summons must be executed and called within a limited period.*]—And be it enacted that by virtue of such warrant of arrestment, and also by virtue of letters of arrestment raised upon any libelled summons according to the present practice, it shall be competent before executing the warrant of citation to arrest the moveables, debts, and money belonging or owing to the defender until caution be found as aforesaid; and such arrestment shall be effectual, provided the warrant of citation shall be executed against the defender within twenty days after the date of the execution of the arrestment, and the summons called in court within twenty days after the diet of compareance, or where the expiry of the said period of twenty days after the diet of compareance falls within the vacation, or previous to the first calling day in the session next ensuing, provided the summons be called on the first calling day next thereafter; and if the warrant of citation shall not be executed and the summons called in manner above directed, the arrestment shall be null, without prejudice to the validity of any subsequent arrestment duly executed in virtue of the said warrant.

18. [*Arrestments against persons furth of the kingdom to be executed at the Record Office.*]—And be it enacted that from and after the said thirty-first day of *December* it shall not be competent to execute any arrestment as in the hands of a person furth of *Scotland* by service at the market-cross of *Edinburgh*, and pier and shore of *Leith*, but such arrestment shall be executed by delivery of a schedule of arrestment at the Record Office of Citations in the Court of Session, which delivery shall be made and the schedule registered and published in the same manner as charges are directed to be registered and published by an Act passed in the sixth year of the reign of his late Majesty King *George* the Fourth, intituled *An Act for the better regulating of the Forms of Process in the Courts of Law in Scotland.* (6th Geo. IV., c. 120.)

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19. [*Sheriff's precepts of arrestment may be executed within jurisdiction of another Sheriff.*].—And be it enacted that from and after the said thirty-first day of *December* a warrant or precept of arrestment granted by any Sheriff in *Scotland*, whether contained in a libelled summons or proceeding upon a depending action or liquid document of debt, may lawfully be executed within the territory of any other Sheriff, the same being first indorsed by the sheriff-clerk of such sheriffdom, who is hereby required to make and date such indorsation.

20. [*Lord Ordinary in the Outer-House may recal or restrict arrestments, subject to review.*].—And be it enacted that from and after the said thirty-first day of *December* it shall be competent to the Lord Ordinary in the Court of Session before whom any summons, containing warrant of arrestment, shall be enrolled as judge therein, or before whom any action on the dependence whereof letters of arrestment have been executed, has been or shall be enrolled as judge therein, and to the Lord Ordinary on the Bills in time of vacation, on the application of the debtor or defender, by petition duly intimated to the creditor or pursuer, to which answers may be ordered, to recal or to restrict such arrestment, on caution or without caution, and dispose of the question of expenses, as shall appear just; provided that his judgment shall be subject to the review of the Inner-House by a reclaiming note duly lodged within ten days from the date thereof.

21. [*Sheriff may recal or restrict arrestments, subject to review.*].—And be it enacted that from and after the said thirty-first day of *December* it shall be competent for any Sheriff from whose books a warrant of arrestment has been issued, on the petition of the debtor or defender duly intimated to the creditor or pursuer, to recal or to restrict such arrestment, on caution or without caution, as to the Sheriff shall appear just; provided that the Sheriff shall allow answers to be given in to the said petition, and shall proceed with the further disposal of the cause in the same manner as in summary causes, and his judgment shall be subject to review in the Court of Session.

22. [*Arrestments to prescribe in three years.*].—And be it enacted that an Act of the Parliament of *Scotland* passed in the year One thousand six hundred and sixty-nine, concerning prescriptions, shall be and is hereby repealed in so far as regards the period of prescription of arrestments; and all arrestments shall hereafter prescribe in three years instead of five; and arrestments which shall be used upon a future or contingent debt shall prescribe in three years from the time when the debt shall become due and the contingency be purified; but saving and reserving from the operation hereof all arrestments

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already used where the ground of arrestment is not an action in dependence at the date of passing this Act.

23. [*Compearing creditors to be conjoined, and pointed effects to be valued.*].—And be it enacted that from and after the said thirty-first day of *December*, where an officer of the law shall proceed to point moveable effects, he shall, if required before the pointing is completed, conjoin in the pointing any creditor of the debtor who shall exhibit and deliver to him a warrant to point; and on the effects being pointed the officer shall cause them to be valued by two valuator, and one valuation by them shall be sufficient.

24. [*Effects to be left with, and schedule given to the possessor.*].—And be it enacted that the officer shall leave the pointed effects with the person in whose possession they were when pointed; and he shall deliver to the possessor a schedule specifying the pointed effects, and at whose instance they were pointed, and the value thereof.

25. [*Officer to report pointing within eight days.*].—And be it enacted that the officer shall, within eight days after the day on which the pointing was executed (unless cause shall be shown why the same could not be done within the period of eight days), report the execution thereof to the Sheriff, in which execution he shall specify the diligence under which the pointing is executed, the amount of the debt, the names and designations of the debtor and of the creditor at whose instance the effects were pointed, the effects pointed, the value thereof, the names and designations of the valuator, the person in whose hands they were left, and the delivery of the schedule as aforesaid; which execution shall be subscribed by him and by the two valuator, who shall also be witnesses to the pointing, without the necessity of other witnesses.

26. [*Sale to be advertised, and notice to the debtor.*].—And be it enacted that on the execution being reported the Sheriff shall, if necessary, give orders for the security of the moveables, and if they be of a perishable nature for the immediate disposal thereof, under such precautions as to him shall seem fit; and if not so disposed of, and if no lawful cause be shown to the contrary, he shall, if required, grant warrant to sell them by public roup, at such time and at such place, with such public notice of the sale, as may appear to the Sheriff most expedient for all concerned, and at the sight of a judge of the roup to be named by the Sheriff; provided that the sale shall not take place sooner than eight days nor at a longer period than twenty days after the date of the publication of the said notice of sale; and the Sheriff shall order a copy of the warrant of sale to be served on

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the debtor, and on the possessor of the poinded effects, if he be a different person from the debtor, at least six days before the date of the sale, excepting in the case of perishable effects.

27. [*Effects to be sold or delivered to pouncing creditors.*].—And be it enacted that the poinded moveables shall be offered for sale as ordered at upset prices not less than the appraised values thereof; but if no offerer appear, the effects, or such part thereof as, according to their appraised value, may satisfy the debt, interest, and expenses due to the pouncing creditor and conjoined creditor, shall be delivered by the judge of the roup to the said pouncing creditor and conjoined creditor, or to his or their authorised agent, subject to the claims of other creditors, to be ranked as by law competent.

28. [*Report and price to be lodged.*].—And be it enacted that on the moveables being sold or delivered as aforesaid, the judge of the roup shall within eight days after the date of the sale make a report to the Sheriff of the said sale or delivery; and if the effects shall have been sold, he shall also within the said space of eight days lodge with the sheriff-clerk the roup rolls, or certified copies thereof, and an account of the sum arising from and of the expenses of the sale, which sum the Sheriff may, if he shall see cause, order to be lodged in the hands of the sheriff-clerk; and the said sum, after deduction of lawful charges, shall, if no cause be shown to the contrary, be ordered by the Sheriff to be paid to the pouncing creditor and conjoined creditor (provided the amount does not exceed the amount of the debt, interest, and expenses), but subject to the claims of other creditors, to be ranked as by law competent; and the report and relative documents, when lodged, shall be patent to all concerned on payment of a fee of one shilling only.

29. [*Creditors entitled to purchase.*].—And be it enacted that where any effects are exposed to sale as aforesaid it shall be lawful for the poulder or any other creditor to purchase the same.

30. [*Unlawful intromitter liable to imprisonment or double the appraised value.*].—And be it enacted that if any person shall unlawfully intromit with or carry off the poinded effects, he shall be liable, on summary complaint to the Sheriff of the county where the effects were poinded or where he is domiciled, to be imprisoned until he restore the effects or pay double the appraised value.

31. [*Act not to affect landlord's hypothec.*].—And be it enacted that nothing herein contained shall affect the landlord's hypothec for rents, or any hypothec known in law.

32. [*Citations, &c. One witness.*].—And be it enacted that ex-

1 & 2 Vict., c. 114.

tracts, citations, deliverances, schedules, and executions may be either printed or in writing, or partly both, and that, excepting in the case of poidings, more than one witness shall not be required for service or execution thereof.*

33. [*Compensation.*].—And be it enacted that it shall be lawful for any person entitled to compensation for loss to be suffered through the operation or effect of this Act to make application to the Lord High Treasurer, or to the Commissioners of Her Majesty's Treasury of the United Kingdom of *Great Britain and Ireland* for the time being, claiming such compensation, giving at the same time notice of such application to Her Majesty's Advocate; and it shall be lawful for the said Lord High Treasurer, or Commissioners of the Treasury, to investigate such claim, and call for such evidence in relation thereto as he or they may think necessary; and upon such claim being established to his or their satisfaction, the said Lord High Treasurer, or Commissioners of Her Majesty's Treasury, or any three of them, is and are hereby authorised and empowered to award to such person such compensation as he or they shall think him entitled to, either by the payment of a gross sum or by way of annuity, as he or they shall think proper: Provided always that a copy of every such award for

* Amended by the following Act:—
9 & 10 Vict., c. 67.—An Act to remove doubts concerning Citations and Services, and execution of Diligence in *Scotland*.—26th August 1846.

Whereas an Act was passed in the second year of the reign of Her Majesty, intituled, *An Act to amend the Law of Scotland in matters relating to personal diligence, arrestments, and poidings* (1 & 2 Vict., c. 114), whereby it was enacted that extracts, citations, deliverances, schedules, and executions, may be either printed or in writing, or partly both, and that, excepting in the case of poidings, more than one witness shall not be required for service or execution thereof: And whereas doubts have been entertained regarding the interpretation of the provisions above recited; and it is expedient to remove such

doubts: Be it therefore declared and enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same:—

[*Recited enactment to apply to all citations, services, &c.*].—That the enactment hereinbefore recited does and shall apply to all citations on all summonses, and to all cases whatsoever of services and execution, and that more than one witness is not, and shall not be required for service or execution in any case, excepting only in cases of poiding, as aforesaid.

2. [*Act may be amended, &c.*].—And be it enacted that this Act may be amended or repealed by any Act to be passed in the present session of Parliament.

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compensation shall be laid before both Houses of Parliament within two calendar months after the commencement of the session next ensuing after making the same; and no such award shall be final and conclusive until two calendar months after the same shall have been so laid before Parliament: Provided also that if any person to whom compensation shall be so awarded by way of annuity shall be afterwards appointed to any other public office, such compensation shall be accounted *pro tanto* of the salary payable to such person in respect of such other office while he shall continue to hold the same.

34. [*Compensation how to be paid.*].—And be it enacted that the several compensations which may be awarded under the authority of this Act shall be payable and paid out of the monies which by the Acts of the seventh and tenth years of the reign of Her Majesty Queen Anne were made chargeable with the fees, salaries, and other charges allowed or to be allowed for keeping up the Courts of Session, Justiciary, or Exchequer in Scotland.

35. [*Diligence under this Act.*].—Provided always and be it enacted that diligence executed under the provisions of this Act shall have the same effect as if such diligence had been executed by virtue of letters of horning or letters of caption, or if arrestments and poindings had been executed under the forms heretofore in use.

36. [*Act may be repealed, &c.*].—And be it enacted that this Act may be amended or repealed by any Act to be passed during the present session of Parliament.

 SCHEDULES referred to in the foregoing Act.

 No. 1.—*Warrant to be subjoined to Extracts in the Court of Session, &c.*

And the said Lords grant warrant to Messengers-at-Arms in Her Majesty's name and authority to charge the said *A* personally, or at his dwelling place, if within Scotland, and if furth thereof by delivering a copy of charge at the Record Office of the Keeper of the Records of the Court of Session [*state what the party is discerned to do; if to pay money, specify the sum, interest, and expenses; or if to fulfil an obligation, specify it as in the decree or other document*], and that to the said *B* [*specify the name of the person in whose favour the decree is pronounced*] within [*insert the appropriate days*] next after he is charged so that effect, under the pain of poinding and imprisonment [*if the sum or any part thereof be payable at a future time, add here, "the terms of payment being always first come and bygone"*]; and also grant warrant to arrest the said *A*'s readiest goods, gear, debts, and sums of money in payment and satisfaction of the

1 & 2 Vict., c. 114.

said sum, interest and expenses; and if the said *A* fail to obey the said charge, then to poind the said *A*'s readiest goods, gear, and other effects, and, if needful for effecting the said poinding, grant warrant to open all shut and lockfast places in form as effeirs. Extracted [*specify place and date*].

[*Extractor's signature.*]

No. 2.—*Execution of Charge.*

Upon the _____ day of _____, I, _____, messenger-at-arms [*or officer of court*], by virtue of [*state nature and date of extract and decree or document whereupon it proceeds*], at the instance of *B* [*specify name and designation of creditor*] against *A* [*specify name and designation of debtor or obligant*] passed and in Her Majesty's name and authority lawfully charged the said *A* to [*state what the party has been charged to do; if to pay money, specify the sum, interest and expenses; or if to fulfil an obligation, specify it as in the extract*], and that to the said *B* within _____ days next after the date of my said charge, under the pain of poinding and imprisonment. This I did by [*state mode of execution, whether personally or otherwise*], before and in presence of *C*, witness to the premises.

[*Officer's signature.*]

[*Witness' signature.*]

No. 3.—*Certificate of Registration of Execution of Charge.*

Presented by *A B* [*state name and designation*], and registered in the General Register of Hornings on the _____ day of _____.

[*Keeper's signature.*]

No. 4.—*Minute in Bill Chamber for warrant to imprison.*

[*Place and Date.*]

The charge being expired and registered as per execution and certificate produced, warrant is craved to search for, take, and apprehend the person of the said *A* [*specify name of debtor or obligant*], and being so apprehended to imprison him within a Tolbooth or other warding place, therein to remain until he fulfil the said charge, and, if necessary for that purpose, to open shut and lockfast places; and warrant also to magistrates and keepers of prisons to receive and detain the said *A* accordingly.

(Signed) *A B*, W.S.

[*The Clerk will subjoin*]

Fiat ut petitur.

[*Dated and signed by the Clerk.*]

 Personal Diligence Act, 1888.

No. 5.—*Minute by Assignee, &c.*

[Place and Date.]

Warrant is craved [state what is prayed for] at the instance of [specify name and designation of the applicant] as [assignee or otherwise, as the case may be] of [specify name and designation of the person at whose instance the extract was issued]. Produced herewith [assignment or confirmation or other legal evidence of the acquired right, as the case may be]. Dated the day of [and if for imprisonment, execution of expired charge and certificate of registration shall be produced and warrant craved as in No. 4].

(Signed) A B.

[The Clerk will subjoin]

Fiat ut petitur.

[Dated and signed by the Clerk.]

No. 6.—*Warrant to be subjoined to Sheriff-court Extracts.*

And I, the said Sheriff, grant warrant to messengers-at-arms and officers of court to charge the said A personally, or at his dwelling-place [state what the party is decerned to do; if to pay money, specify the sum, interest, and expenses; or if to fulfil an obligation, state the nature of it, as in the decree or other document], and that to the said B [name of the person in whose favour the decree is pronounced], within [insert the appropriate days] next after he is charged to that effect, under the pain of poinding and imprisonment, [if the sum or document or any part be payable at a future time, add here, "the terms of payment being first come and bygone"]; and also grant warrant, in satisfaction of the said sum, interest, and expenses, to arrest the said A's readiest goods, debts, and sums of money; and if the said A fail to obey the said charge, then to apprise, poind, and distrain all the said A's readiest goods, gear, and other effects; and if needful for effecting the said poinding, grant warrant to open all shut and lockfast places, in form as effairs. Extracted, &c.

[Extractor's signature.]

No. 7.—*Certificate of Registration of execution of charge in Sheriff-court.*

Presented by A B [name and designation], and registered in the Particular Register of Hornings for the shire of on the day of

[Keeper or Clerk's signature.]

No. 8.—*Minute in Sheriff-court for warrant to imprison.*

[Place and Date.]

The charge being expired and registered as per execution and certificate produced, warrant is craved to search for, take, and apprehend the person of the said A [name of debtor or obligant], and being so appre-

1 & 2 Vict., c. 114.

hended to imprison him within a Tolbooth or other warding place, therein to remain until he fulfil the said charge, and, if necessary for that purpose, to open shut and lockfast places; and warrant also to magistrates and keepers of prisons to receive and detain the said *A* accordingly.

(Signed) *A B.*

[*The Clerk will subjoin*]

Fiat ut petitur.

[*Dated and signed by the Clerk.*]

No. 9.—*Minute in Sheriff-court by Assignee, &c.*

[*Place and Date.*]

Warrant is craved [*state what is prayed for*] at the instance of [*specify name and designation of the applicant*], as [*assignee or otherwise, as the case may be*] of [*specify name and designation of the person at whose instance the extract was issued and in whose right the applicant is*], produced herewith, [*say assignation or confirmation, or other legal evidence of the acquired right, as the case may be*]. Dated the day of [*and if for imprisonment, execution of expired charge and certificate of resignation shall be produced, and warrant craved to imprison as in No. 8*].

(Signed) *A B.*

[*The Clerk will subjoin*]

Fiat ut petitur.

[*Dated and signed by the Clerk.*]

No. 10.—*Minute for warrant of concurrence.*

[*Place and Date.*]

Warrant of concurrence by the Lords of Council and Session is craved at the instance of [*specify name and designation of applicant*] for executing the within warrant against the within-designed [*specify name of debtor or obligant*].

A B.

[*If the application is to a Sheriff, leave out "Lords of Council and Session," and say Sheriff of (inserting the shire).*]

[*The clerk of the bills or the sheriff-clerk, as the case may be, will subjoin*]

Fiat ut petitur.

[*Dated and signed by the clerk of the bills or sheriff-clerk, as the case may be.*]

Sheriff-court Act, 1838.

1 & 2 Vict., c. 119.—An ACT to regulate the Constitution, Jurisdiction, and Forms of Process of Sheriff-courts in Scotland.—16th August 1838.

Whereas the office of Sheriff and the Sheriff-courts in *Scotland* have been found to be of great utility, by affording in all ordinary cases a cheap and speedy administration of justice: And whereas it is expedient to regulate the constitution and enlarge the jurisdiction of Sheriff-courts, and to amend the forms of proceedings therein: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same:

[*So much of the Act of 20 Geo. II. as requires residence of Sheriffs in their counties repealed.*].—That so much of an Act passed in the twentieth year of the reign of His Majesty King *George* the Second, for taking away and abolishing the heritable jurisdictions in *Scotland*, and for certain other purposes, as enacts that every sheriff-depute and steward-depute shall be and reside personally within his county, shire, or stewartry during the space of four months at least in the year, and also so much of the said Act as enacts a penalty upon being convicted of not so residing, shall be and the same is hereby repealed; and that all laws, statutes, acts of sederunt, and usages shall be and the same are hereby repealed in so far as they are inconsistent or at variance with the provisions of this Act: Provided always that the same shall be in force in all other respects whatsoever.

2. [*Sheriff-depute to hold courts in his sheriffdom, and to attend the Court of Session.*].—Provided always and be it enacted that every Sheriff-depute shall attend personally within his sheriffdom upon all necessary and proper occasions, and shall, unless prevented by indisposition or other necessary cause of absence arising from his official duties, hold at least four ordinary courts within his sheriffdom for the exercise of his ordinary civil or criminal jurisdiction during each period between the first day of *December* and the twelfth day of *May* ensuing, and other four such courts during each period between the first day of *June* and the twelfth day of *November* ensuing, except in the sheriffdom of *Orkney* and *Zetland*; wherein the Sheriff-depute shall hold at least eight such courts during each period between the first day of *December* and the twelfth day of *November* ensuing, four such courts being held in *Orkney* and four in *Zetland*; and each Sheriff shall, fourteen days previously, announce the periods of holding such courts by

1 & 2 Vict., c. 119.

a notice put up in the Sheriff-court rooms, and shall within ten days after the twelfth day of *November* annually make a return to Her Majesty's principal Secretary of State for the Home Department of the number of courts held by him, and causes disposed of as aforesaid, from the first day of *December* preceding, stating the cause of absence in case he shall not have held courts as herein provided; and every person who shall be hereafter appointed to the office of Sheriff-depute shall be an advocate of three years' standing at least, and shall have been at the time of his appointment in practice before and in habitual attendance upon the Court of Session or acting as a Sheriff-substitute; and after such appointment every such Sheriff, with the exception of the Sheriffs of the Counties of *Edinburgh* and *Lanark*, shall be in habitual attendance upon the said Court of Session during the sittings thereof; and if any such Sheriff, excepting as aforesaid, shall not hold courts within his sheriffdom, or shall not attend the Court of Session as before provided, it shall be competent for Her Majesty's Advocate to present a summary petition and complaint to the Court of Session complaining of such Sheriff not holding courts or of such non-attendance, and the same being thereupon duly investigated and established upon a summary trial before the said court, such Sheriff shall be admonished for the first offence, and for the second shall be deprived of his office.

3. [*As to the removal of Sheriff-substitutes.*].—And be it enacted that no Sheriff-substitute receiving salary shall hereafter be removable from his office by the present or any future Sheriff unless with the consent of the Lord President and Lord Justice-Clerk for the time being, expressed in writing.

4. [*Sheriff-substitutes to continue to hold office on the death of deputies.*].—And be it enacted that on the death, resignation, or removal of any Sheriff-depute his substitute or substitutes shall continue to hold his or their offices, and to exercise all the jurisdictions, powers and authorities thereto belonging, without the necessity of any new appointment or commission from the succeeding Sheriff: Provided always that appeals may be taken in causes decided by such Sheriff-substitute to the Sheriff to be appointed, which shall be laid before such Sheriff when he shall enter upon his office.

5. [*Sheriff-substitutes to reside within their sheriffdoms.*].—And be it enacted that every person holding the office of Sheriff-substitute and receiving salary on that account, shall reside personally within his jurisdiction, and shall not be absent therefrom more than six weeks in any year, nor for more than two weeks at any one time, nor so as

Sheriff-court Act, 1838.

to interfere with the regular sittings of his Court, without the special consent in writing of the Sheriff of such county for the time being, who shall be bound, in the event of his giving such consent, either to attend personally during the absence of such substitute, or to appoint another fit person as substitute to act in his stead; and it shall not hereafter be lawful for any Sheriff-substitute so receiving salary to act as agent either in legal, banking, or other business, or as conveyancer, factor, or chamberlain, except for the Crown, or to be appointed to any office, except such office as shall be by statute attached to the office of Sheriff-substitute.

6. [*Superannuation allowances to Sheriff-substitutes.*].—And be it enacted that Her Majesty and her heirs and successors may grant an annuity, payable in like manner as salaries to Sheriff-substitutes, to any person who has held, now holds, or may hereafter hold the office of Sheriff-substitute, according to the proportions and with reference to the amount of their salaries and the periods of their services as hereinafter mentioned, if from old age or any permanent infirmity such person has been or shall hereafter be disabled from the due exercise of his office: Provided always that such annuity shall not exceed one-third of the salary payable to such person in case the period of his service shall have been not less than ten years, and shall not exceed two-thirds of such salary in case the period of service shall have been not less than fifteen years, and shall not exceed three-fourths of such salary in case the period of service shall have been not less than twenty years or upwards: Provided also that no such annuity shall be granted unless such Sheriff-substitute shall have duly fulfilled the duties of his office during one of the periods before-mentioned, and is from old age or permanent infirmity disabled from the due exercise of his office, which facts shall be certified by the Lord President, the Lord Justice-Clerk, and the Lord Advocate, for the time being, as having been established to their satisfaction by proper evidence.

7. [*Office of Sheriff-substitute of Leith to cease.*].—And whereas by the death of *Duncan Mathieson*, esquire, advocate, late Sheriff-substitute of *Leith*, the office of Sheriff-substitute of *Leith* has become vacant; be it enacted that the said office of Sheriff-substitute of *Leith* as heretofore constituted shall cease and determine, anything in any Act of Parliament to the contrary notwithstanding.

8. [*Summary complaint for removing from premises let for less than a year.*].—And whereas it is expedient to diminish the expense and delay with which the process of removing from houses and other

1 & 2 Vict., c. 119.

heritable subjects, of the rent hereinafter provided, let for any shorter period than a year, in *Scotland*, is attended; be it enacted that where houses or other heritable subjects in *Scotland* are let for any shorter period than a year at a rent of which the rate shall not exceed Thirty Pounds *per annum*, it shall be competent for any person authorised by law to pursue a removing therefrom, to present a summary complaint to the Sheriff of the territory, who shall order it to be served, and the defender to appear on such day as he may in each case think proper, in the form or to the effect of schedule (A) annexed to this Act.

9. [*Defender may repone against decree in absence.*].—And be it enacted that if the defender shall fail to appear after being duly cited, the Sheriff shall proceed to determine the cause in the same manner as if the defender had been personally present: Provided always that where the decree shall have been pronounced in absence, and shall not have been carried into execution, the defender may present a petition to the Sheriff for a further hearing of the cause, with evidence of intimation thereof having been made to the opposite party written thereon, and the Sheriff, if he shall see cause, and upon payment by the defender to the complainer of such expenses as the Sheriff may judge reasonable, may recal his decree, and proceed to hear and determine the cause as on the original complaint without delay; and provided also that where decree shall be pronounced in absence, the Sheriff may give such order for preservation of the goods and effects of the defender as he may deem proper.

10. [*Warrant to cite witnesses, and provision as to fees.*].—And be it enacted that the complaint or copy thereof served on the defender shall be a sufficient warrant to any sheriff-officer to cite witnesses or havers for either party to appear on the day of trial, and give evidence in such summary cases of removing; and the fees allowed to the clerk or officers of court on such complaint and proceedings shall be the same as those allowed on summonses and similar proceedings in small debt causes in Sheriff-courts in *Scotland*, under an Act passed during the last Session of Parliament, intituled *An Act for the more effectual recovery of small debts in the Sheriff-courts, and for regulating the establishment of Circuit Courts for the trial of Small Debt Causes by the Sheriffs, in Scotland* (7 Will. IV., & 1 Vict., c. 41): Provided always that the travelling expenses of officers and their assistants under the said recited Act and this Act shall not be allowed for more than the distance from the residence of the officer employed to the place of execution or service, in case such distance shall be less

Sheriff-court Act, 1838.

than from the court-house to such place, and the Sheriff shall have power to modify such expenses in case the officer residing nearest to the place of execution or service shall not be employed; and provided also that such travelling expenses shall not be allowed against an opposite party for a greater distance than twelve miles.

11. [*Citation and farther procedure in removings to be the same as provided for Small Debt causes. Judgments to be final.*].—And be it enacted that the citation and farther procedure in such summary removings shall, in so far as not provided for by this Act, be the same as those established by the said recited Act for the trial of Small Debt causes in Sheriff-courts; and where decree of removing is pronounced it shall be in the form or to the effect of the said schedule (A) and shall have the full force of a decreet of removing and warrant of ejection; and the judgments to be pronounced in such summary actions of removing shall be final, and not subject to review either in the Circuit Court of Justiciary or in the Court of Session.

12. [*Sheriff may adjourn the cause.*].—And be it enacted that the Sheriff may, of consent of parties, or where the ends of justice require it, adjourn the further hearing of or procedure in any summary process of removing raised under the authority of this Act, and he may likewise order written answers to be given in to the complaint; and all such orders shall be final, without being subject to appeal or advocacy: Provided always that the Sheriff shall in all such cases where the defences cannot be instantly verified ordain the defender to find caution for violent profits.

13. [*Where defender has found caution he may give in written answers to complaint.*].—And be it further enacted that in all cases where the defender has found caution he shall be allowed to give in written answers to the complaint; and in all cases where written answers shall be ordered such cases shall thereafter be conducted, as nearly as may be, according to the forms in use in ordinary processes of removing, and the judgment of the Sheriff therein shall be subject to review in common form.

14. [*Members of College of Justice not exempt.*].—And be it enacted that no person shall be exempt from the jurisdiction of the Sheriff in any process of removing raised under the authority of this Act on account of privilege, or being a member of the College of Justice, or otherwise.

15. [*Sheriffs' jurisdiction extended in questions of nuisance and servitude.*].—And be it enacted that the jurisdiction, power, and

1 & 2 Vict., c. 119.

authority of Sheriffs of *Scotland* shall be and the same are hereby extended to all actions or proceedings relative to questions of nuisance or damages arising from the alleged undue exercise of the right of property, and also to questions touching either the constitution or the exercise of real or prædial servitudes; and all parties against whom such actions or proceedings may be brought shall be amenable to the jurisdiction of the Sheriff of the territory within which such property or servitude shall be situated.

16. [*Transmission book to be kept by sheriff-clerks.*—And be it enacted that the sheriff-clerk of every Sheriff-court shall keep a book in which he shall enter in a tabular form, in columns, in the form of schedule (B) hereto annexed, every cause transmitted to the Sheriff or Sheriff-substitute in order to be advised, specifying, in separate columns, ordinary and summary causes, the Sheriff to whom the same has been transmitted, the date of such transmission, the date of the cause being received by the Sheriff and returned advised, and any remarks which the Sheriff may enter or direct to be entered in such book relative to any such cause; and an inventory of the process shall be kept by the clerk, in which the borrowing and returning of processes shall be entered, and no process shall be given up by the clerk without a receipt upon such inventory.

17. [*Additional court-days to be appointed to dispose of arrears of business.*—And be it enacted that in case there shall be an arrear of business undisposed of by the Sheriff in any Sheriff-court it shall be the duty of the Sheriff from time to time to appoint additional court-days, whether in time of session or vacation, for the purpose of disposing of such arrear.

18. [*Sheriffs may repon against decrees in absence.*—And be it enacted that where decree in absence in any civil cause shall have been pronounced or extracted in any Sheriff-court, other than in causes in the Small Debt Court, or in processes of removing raised under authority of this Act, a petition may be presented to the Sheriff-court in which such decree was pronounced to be reponed against the said decree, and any letters of horning or charge following thereon, where the same shall not have been implemented in whole or in part, and on consignment in the hands of the clerk of court of the expenses incurred, as the same may be modified on taxation, the said Sheriff shall repon the defender, and revive the action or proceeding in which such decree had been pronounced as if decree had not been pronounced or extracted, and shall have power to award to the pursuer such part of the expenses consigned as he

Sheriff-court Act, 1888.

may judge reasonable; and the Sheriff shall pronounce such order for intimation to and appearance of the opposite party as may be just; and such order may be executed against a person in any other county as well as in the county where such order is issued, the same being previously indorsed by the Sheriff-clerk of such other county, who is hereby required to make and date such indorsation; and such order being so made and executed, all further orders and interlocutors in the cause shall be sufficient and effectual.

19. [*Suspensions competent in Sheriff-courts of charges for sums under £25.*].—And be it enacted that where a charge shall be given on a decree of registration proceeding on a bond, bill, contract, or other form of obligation, registered in any Sheriff-court books, or in the books of Council and Session, or any others competent, or on letters of horning following on such decree, for payment of any sum of money not exceeding the sum of twenty-five pounds of principal, exclusive of interest and expenses, any person so charged may apply by petition to the Sheriff-court of his domicile for suspension of the said charge and diligence on caution; and on sufficient caution being found in the hands of the clerk of court for the sum charged for, and interest and expenses to be incurred in the Sheriff-court, the Sheriff shall have power to sist execution against the petitioner, and to order intimation of the petition of suspension and answers to be given in thereto, and thereafter to proceed with the further disposal and decision of the cause in like manner as in summary causes in such court, and to suspend the charge and diligence so far as regards the petitioner; provided that the said order for intimation and answers as aforesaid may be made and carried into execution against any person in any other county as well as in the county where such order is issued, in manner and to the effect hereinbefore provided.

20. [*Sheriff's judgment on preliminary objection to suspension final.*].—And be it enacted that if any petition of suspension as aforesaid shall be presented in any Sheriff-court, and a preliminary objection be made to the competency of such petition, or to the regularity thereof, an appeal against the judgment of the Sheriff-substitute repelling or sustaining such objection may be taken in common form to the Sheriff, whose judgment thereon shall be final, and not subject to review either in the Circuit Court of Justiciary or in the Court of Session.

21. [*Sheriffs' jurisdiction in maritime causes under 1 Will. IV., c. 69 explained.*].—And whereas by an Act passed in the first year of the

1 & 2 Vict., c. 119.

reign of his late Majesty King *William the Fourth*, intituled *An Act for uniting the benefits of jury trial in civil causes with the ordinary jurisdiction of the Court of Session, and for making certain other alterations and reductions in the judicial establishments of Scotland*, it is enacted that the Sheriffs of *Scotland* shall, within their respective sheriffdoms, including the navigable rivers, ports, harbours, creeks, shores, and anchoring grounds in or adjoining such sheriffdoms, hold and exercise original jurisdiction in all maritime causes and proceedings, civil and criminal, including such as may apply to persons residing furth of *Scotland*, of the same nature as that heretofore held and exercised by the High Court of Admiralty: And whereas doubts have arisen regarding the extent of such jurisdiction, and it is expedient that such doubts should be removed; be it therefore enacted and declared that the said recited Act shall be construed and held to mean that the powers and jurisdictions formerly competent to the High Court of Admiralty of *Scotland* in all maritime causes and proceedings, civil and criminal, shall be competent to the said Sheriffs and their substitutes, provided the defender shall, upon any legal ground of jurisdiction, be amenable to the jurisdiction of the Sheriff before whom such cause or proceeding may be raised; and provided also that it shall not be competent to the Sheriff to try any crime committed on the seas which it would not be competent for that judge to try if the crime had been committed on land.

22. [*Caution judicatum solvi not required in maritime causes in Sheriff-courts.*].—And be it enacted that in maritime causes or proceedings raised or brought before any Sheriff-court in *Scotland* caution judicatum solvi or de damnis et impensis shall not be required in any such cause or proceeding from any party who shall be domiciled in *Scotland*, any law or practice to the contrary notwithstanding, unless the judge shall require it on special grounds to be stated in the interlocutor requiring the same, or a note annexed thereto.

23. [*Summonses, &c., in Sheriff-courts to be served in presence of one witness.*].—And be it enacted that summonses, petitions, complaints, charges, arrestments, and other proceedings in Sheriff-courts, excepting poudings, shall be deemed to be duly served and executed provided the same shall be served or executed by the usual officer of the law in such Courts in presence of one person, who shall witness such service or execution, and both of whom shall attest the execution of the same by their subscriptions in common form.

24. [*Citation of parties, witnesses, and havers.*].—And whereas it is expedient to authorise citation to Sheriff-courts of persons in *Scot-*

Sheriff-court Act, 1838.

land without the necessity of having recourse to letters of supplement from the Court of Session; be it enacted that it shall be competent to cite all persons within *Scotland* as parties in any civil or criminal action or proceeding in any Sheriff-court who may be amenable to the jurisdiction of such Court in respect of such action or proceeding by the warrant of such Sheriff-court; and it shall also be competent to cite witnesses and havers within *Scotland* in any civil or criminal action or proceeding in any such courts by the warrant of such courts; and all such warrants shall have the same force and effect in any other sheriffdom as in that in which they were originally issued, the same being first indorsed by the sheriff-clerk of such other sheriffdom, who is hereby required to make and date such indorsation; and such citation duly made shall be deemed to be due and regular citation; and if any witness or haver duly cited shall fail to appear, it shall be competent to any party for whom such witness or haver is cited to apply for a new warrant to compel his attendance at such court, at such reasonable time as may be fixed, which warrant shall require such witness or haver to attend as aforesaid under a penalty not exceeding forty shillings, unless a reasonable excuse be offered and sustained; and every such penalty shall be paid to the party applying for the new warrant as aforesaid, and shall be recovered in the same manner as penalties under the before-recited Act for the more effectual recovery of Small Debts in the Sheriff-courts, or under any Act by which the same shall have been or may be repealed, altered, or amended, without prejudice always to letters of second diligence for compelling witnesses and havers to attend as at present competent; and it shall be competent to execute and carry into effect such letters of second diligence in any other sheriffdom, the same being indorsed by the sheriff-clerk of that sheriffdom, as before provided: Provided always that nothing in this Act contained shall affect the competency of applying for and obtaining letters of supplement in common form for the purpose of citing such parties, witnesses, or havers; and provided also that it shall be no objection to any witness or haver that he has appeared without citation.

25. [*Sheriffs' criminal warrants may be executed out of the county.*]

—And be it enacted that any criminal warrant granted by any Sheriff against any person charged with having committed a crime or offence within the jurisdiction of the said Sheriff, and also any warrant granted by a Sheriff against a person as being *in meditatione fugæ*, shall be sufficient for the apprehension of the said person within any other county, and for conveying and disposing of the said person

1 & 2 Vict., c. 119.

in terms of the warrant, without the necessity of its being backed or indorsed by any other magistrate: Provided always that the said warrant shall be executed against the person mentioned therein either by a messenger-at-arms or by an officer of the Court where the same was issued.

26. [*Sheriff of two counties may hold commissary court in either.*]—And whereas by an Act passed in the fourth year of the reign of His Majesty King George the Fourth, intituled *An Act for the regulation of the Court of the Commissaries of Edinburgh, and for altering and regulating the jurisdiction of inferior Commissaries in Scotland*, it is provided that where two counties shall be under the jurisdiction of one Sheriff, such two counties shall constitute one commissariat; be it enacted and declared that when two counties shall be under the jurisdiction of one Sheriff as aforesaid it shall nevertheless be lawful for such Sheriff, if he shall think proper, to hold commissary courts in both of such counties in manner and to the effect provided by the said recited Act.

26. [*Sheriffs' juries may be summoned from list of jurors residing within certain distance of court to which they are summoned.*]—And whereas it is expedient to remedy the inconvenience of summoning jurors to attend in Sheriff-courts from distant parts of the county; be it enacted that, except in the counties of *Haddington, Linlithgow, Peebles, Selkirk, Kinross, Clackmannan, Nairn, and Cromarty*, it shall no longer be necessary to summon persons to attend at any Sheriff-court to serve as jurors in any criminal cause who shall reside beyond such distances from the court-house at which the jurors shall be summoned to attend as may from time to time be fixed by the several Sheriffs of the several counties, with the approbation of Her Majesty's principal Secretary of State for the Home Department; and upon such limits being fixed the sheriff-clerks of the several counties, except as aforesaid, shall make up and correct, in manner provided by law, lists of persons qualified to serve as jurors resident within such limits from each court-house at which the Sheriff or his substitute holds courts, which jurors are or may be summoned to attend: Provided always that in *Orkney and Zetland* the jurors shall be summoned from the mainland of each district respectively, and that the attendance of jurors at Sheriff-courts shall not exempt them from attendance at Circuit Courts of Justiciary in their ordinary course of rotation as heretofore; and provided also that magistrates of royal burghs and towns entitled to return or to contribute in returning members to serve in Parliament, and keepers of lighthouses

Sheriff-court Act, 1838.

and their assistants, shall be freed and exempted from being returned and from serving upon juries.

28. [*Emoluments of future sheriff-clerks to be regulated.*].—And whereas it is expedient that the office of sheriff-clerk should be regulated, and that a uniform rate of fees should be established in the several Sheriff-courts in *Scotland*; be it enacted that the table of fees contained in schedule (C) hereto annexed, and to be contained in any additional table which may be framed in terms hereof, and no others, shall be exacted and received by all sheriff-clerks *to be hereafter appointed*, subject to such addition thereto or alteration thereof as may be made by the Lord High Treasurer of the United Kingdom of *Great Britain and Ireland*, or by the Commissioners of Her Majesty's Treasury, or any three of them, a copy of such alteration being always notified two months in the *Edinburgh Gazette* before being made effectual, and being also laid before both Houses of Parliament within one month after the making thereof, or, if Parliament shall not be then sitting, within fourteen days after the next meeting thereof; and the said Lord High Treasurer or Commissioners shall fix the salary which any future sheriff-clerk shall receive, and which shall be payable and paid by or out of the fees and emoluments in civil and criminal proceedings exigible and received by such sheriff-clerks respectively; and any surplus of such fees and emoluments, after satisfying such salaries, shall be applied towards defraying the expenses attending the establishment of the Sheriff-court and Sheriff Small Debt Circuit Courts within the county in which such fees and emoluments shall be collected, in such manner and subject to such regulations for ascertaining the amount of such surplus, and accounting for the same, as the said Lord High Treasurer or Commissioners, or any three of them, shall direct; and where in any of the smaller counties the fees and emoluments which shall hereafter be received under the provisions of this Act may be insufficient for the maintenance of a person duly qualified to execute the duties of a sheriff-clerk, it shall be lawful to the said Lord High Treasurer or Commissioners, or any three of them, to direct that a salary shall be payable to such sheriff-clerk, in addition to the said fees, of such amount as they shall think necessary; and no person who shall hereafter be appointed to the office of sheriff-clerk, or who shall acquire right to any fees or emoluments in any Sheriff-court, in virtue of the provisions of this Act, from and after the passing of the same, shall acquire a vested right to the fees or emoluments of such office, or shall be entitled to any compensation in consequence of the subsequent aboli-

1 & 2 Vict., c. 119.

tion of such office or fees, or of any alteration in the constitution of such office, or in the amount of such fees, or in the mode of paying such sheriff-clerk or officer, either by such fees or such salary as may hereafter be determined: Provided always that it shall be lawful for the said Commissioners, or any three of them, by agreement with any existing sheriff-clerk, to establish the table of fees hereby fixed or to be fixed under the authority of this Act in any Sheriff-courts, and to award to such sheriff-clerk such compensation by way of additional salary as they may think fit; and all such salaries to sheriff-clerks shall be payable out of the funds from which the salaries of Sheriffs are payable: Provided always that every sheriff-clerk shall keep an account stating in columns the amount of the different fees drawn by such clerk under this Act, and the sources thereof, and shall annually, at the beginning of each year, render such account to the said Commissioners of Her Majesty's Treasury in such manner as they shall direct.

29. [*Existing sheriff-clerks and officers not to acquire vested right to increased fees.*—And be it enacted that no existing sheriff-clerk or other officer of any Sheriff-court, shall acquire a vested right to any increased amount of fees or emoluments which may be drawn by them from and after the passing of this Act, or shall be entitled to prefer any claim to compensation in consequence of being prevented from drawing or being deprived of such increased amount of fees or emoluments, or of any alteration either in the mode of levying or disposing of the same.

30. [*Citations, &c., in Zetland.*—And be it enacted that hereafter all proclamations, denunciations, edictal citations, and other public notices made at the market-cross of the burgh of *Lerwick*, in *Zetland*, shall be equally valid as if the same had been made as heretofore at the gate of the Castle of *Scalloway*.

31. [*Power of Court of Session to make regulations by Acts of Sederunt, &c., not to be affected.*—And be it enacted that nothing herein contained shall in any way abridge or affect the power vested in the Court of Session to make and establish rules and regulations by Acts of Sederunt, as authorised by an Act passed in the sixth year of His Majesty King *George the Fourth*, intituled *An Act for the better regulations of the Sheriff and Stewart and Burgh Courts in Scotland*; and the said Court shall so frame such Acts of Sederunt as may be best calculated to carry into effect the purposes of this Act, and also of an Act passed in the sixth and seventh years of the reign of His late Majesty, intituled *An Act for regulating the pro-*

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cess of cessio bonorum in the Court of Session, and for extending the jurisdiction of Sheriffs in Scotland to such causes ; and also, if necessary, to alter or amend the table of fees for practitioners in Sheriff-courts, and adapt the same to the forms of process ; and the Court of Session shall also from time to time make further orders and regulations to amend the forms and preserve uniformity in the proceedings and fees in all Sheriff-courts, the said Court taking into consideration the reports laid before Parliament by the Commissioners appointed under the sign manual of His late Majesty King William the Fourth, dated the sixth day of June One thousand eight hundred and thirty-three, and the sixteenth day of August One thousand eight hundred and thirty-four ; and the said Court shall also, by Act or Acts of Sederunt, from time to time adapt and apply to Sheriff-courts any alterations and amendments which may be made in the forms of proceedings in the Court of Session, so as to make them uniform in as far as it may be expedient so to do ; and the said Court may meet for the aforesaid purposes during vacation as well as during session, and may alter and amend such regulations from time to time ; and all Acts of Sederunt so passed by the Court of Session shall, in terms of the said recited Act of His Majesty King George the Fourth, apply to and receive effect in the Courts of the Royal Burghs in Scotland as well as in the Sheriff-courts : Provided always that within fourteen days from the commencement of every future session of Parliament there shall be transmitted to both Houses of Parliament copies of all such Acts of Sederunt.

32. [*Sheriffs to meet periodically, and to submit propositions to the Court.*].—And be it enacted that in order the better to carry into effect the purposes of the said recited Act and of this Act, and to preserve uniformity in the proceedings of Sheriff-courts, the several Sheriffs of the several sheriffdoms shall meet together in *Edinburgh* in the first week of the first winter session of the said Court after the passing of this Act, and at the like period every three years thereafter, and adjourn such meetings from time to time as they shall see cause ; and at such meetings they shall consider how far uniformity of proceedings exists in Sheriff-courts, and any propositions which may be laid before them, or which they may deem proper to submit to the said Court for attaining that object ; and on or before the first day of *January* next ensuing after each such meeting the said Sheriff shall submit to the Court any regulations which they may propose should be enacted by Act of Sederunt, and the same shall be printed and sent to the different Sheriff-courts, to be exhibited there for the space of

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fourteen days; and the said Sheriffs shall, on or before the twelfth day of *March* next ensuing, prepare and cause to be printed for the consideration of the Court a revised draft; and on the meeting of the Court in the summer session next ensuing the Court shall take such draft into consideration, and pass an Act of Sederunt on or before the twelfth day of *July* following, in such terms as they shall think fit: Provided always that nothing herein contained shall prevent the said Sheriffs from meeting for the purposes aforesaid and submitting propositions as aforesaid to the said Court at any other times, or the said Court from passing any Act or Acts of Sederunt under the powers hereinbefore given at any other times, as such Sheriffs or such Court respectively shall think proper; and provided also that the necessary expenses of such meetings of Sheriffs, and of preparing and printing such propositions, shall be allowed in the annual accounts in Exchequer of such one of the said Sheriffs as may from time to time be appointed by them to be their convener, in the like manner as other ordinary expenses of Sheriffs are allowed.

33. [*Agents qualified to practise before Court of Session may practise in Sheriff-courts*].—And be it enacted that it shall be lawful for all agents duly qualified to practise before the Court of Session to practise as agents in all Sheriff-courts in all actions or proceedings to which the jurisdiction of the Sheriffs is extended by this Act, and which could not have been competently brought before the Sheriff-courts prior to the passing hereof: Provided always that they shall not be entitled to payment of any other or higher fees than those legally exigible by other agents before these courts; and provided also that all such agents in practising in Sheriff-courts shall be subject to such orders and regulations as the Court of Session shall make by Act or Acts of Sederunt in manner hereinbefore provided.

34. [*Meaning of words in this Act.*].—And be it enacted that in all cases in this Act the word “person” shall extend to a partnership, or body politic, corporate, or collegiate, as well as to an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the plural number shall extend and be applied to one person or thing as well as several persons or things; and every word importing the masculine gender only shall extend and be applied to a female as well as a male: Provided always that those words and expressions occurring in this clause to which more than one meaning is attached shall not have the different meanings given to them by this clause in those cases in

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which there is any thing in the subject or context repugnant to such construction.

35. [*Commencement of Act.*—And be it enacted that the whole provisions of this Act, unless where otherwise herein specially provided, shall commence and take effect from and after the thirty-first day of *December* One thousand eight hundred and thirty-eight.

36 [*Act may be amended.*—And be it enacted that this Act may be amended or repealed by any Act to be passed during the present session of Parliament.

SCHEDULES referred to in the foregoing Act.

SCHEDULE (A).

No. 1.—*Form of Summary Complaint.*

Unto the Honourable the Sheriff of the county of

Complains *A B* [*name and design the complainer*] against *C D* [*name and design the defender*], that the complainer [*or his author, as the case may be*] let to the said defender [*or his author as the case may be*] a dwelling-house, garden, and pertinents [*or other subjects, as the case may be*], situate in
for the period from to

; that the said defender is bound to remove from the said subjects at the date last mentioned, and it is necessary to obtain decree of removing against him [*or, as the case may be, refuses or delays to remove therefrom, although the period of his lease has expired*]: Therefore decret ought to be granted for removing and ejecting the said defender, his family, sub-tenants, cottars, and dependents, with their goods and gear, furth and from the said subjects [*here insert the date at which the removal or ejection is sought for, as the case may be*], that the complainer or others in his right may then enter to and possess the same. [*If expenses are sought, add, and the said defender ought to be found liable in expense of process and dues of extract.*]

[*Signature of the Party or Agent.*]

No. 2.—*Form of Warrant thereon.*

The Sheriff grants warrant to cite the said defender to compear personally before him at the court house [*or elsewhere, as the case may be*], upon the [*insert the day of month and hour, if need be*], to answer the foregoing complaint, under certification of being held as confessed; ordains such citation to be made at least [*state the period which the Sheriff may fix to intervene betwixt the citation and diet of compearance*], previous to the said diet of compearance; and grants warrant to cite witnesses for both parties to appear, time and place foresaid, to give evidence in the said matter, under

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the pains of law. Given under the hand of the clerk of court at
the day of

Sheriff-clerk.

No. 3.—*Form of Citation for Defender.*

C D, defender above designed, you are hereby summoned to appear and answer before the Sheriff in the matter complained of, and that at [here specify time and place], under certification of being held as confessed.

This notice is served upon the _____ day of _____
by me _____

Sheriff-officer.

No. 4.—*Form of Execution of Citation.*

Upon the _____ day of _____ I duly sum-
mond the above-designed *C D*, defender, to appear and answer before the
Sheriff in the matter, and at the time and place and under the certification
above set forth. This I did by delivering a copy of the above complaint,
with a citation thereto annexed, to the said defender personally [*or other-
wise, as the case may be*].

Sheriff-officer.

No. 5.—*Form of Decree and Warrant of Ejection.*

At the day of the which day the Sheriff [in absence of the defender, *or*, having heard parties, *as the case may be*] decerns and grants warrant for removing and ejecting the said *D C*, defender, and others mentioned in the complaint, from the subjects therein specified, such ejection not being sooner than [*here insert the time appointed for removal, and whether after a charge on such induciæ as may be deemed proper, or instantly*] finds the said defender liable in expenses [*or otherwise, as the case may be*], and decerns.

[*Sheriff's Signature.*]

Note.—The whole of the above to be in the same paper.

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SCHEDULE (B).

Transmission Book to be kept by Sheriff-Clerks.

Names of Cause, [as <i>A</i> versus <i>B</i> , or <i>A</i> , Petitioner, &c.]		Date of Transmission to Sheriff- Substitute.	If Proof led, state whether before Sheriff or Substitute or Com- missioner, and its duration.	Date of Case being returned and ad- vised.	Date of Transmis- sion to Sheriff.	Date of Cause be- ing re- turned and advised.	REMARKS.*
Ordinary Causes.	Summary Causes.						

Note.—Where cases have been longer than ten days unadvised after transmission to the Sheriff, the reason to be stated in this column.

Also the names of any Commissioners to whom remits have been made to take proofa.

SCHEDULE (C).

Table of Fees in Civil Business for the Sheriff-Clerks of Scotland.

	In Cases of £12 and under.			Above £12.		
	£	s.	d.	£	s.	d.
Libel, Summons, or claim to found an action, .	0	0	9	0	1	3
When more defenders than one are sued for a separate debt or prestation, the above fees to be paid on one of the debts or prestations highest in amount, and a third of the above fees to be paid for each of the other debts or prestations,						

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	In Cases of £12 and under.			Above £12.		
	£	s.	d.	£	s.	d.
according to the amount of the claim against each defender or set of de- fenders.						
Certifying copy of libel, in terms of Act of Sede- runt for Sheriff-courts, cap. 18, § 4, . . .	0	0	6	0	0	6
Summary petition or complaint (except petition of sequestration), and deliverance thereon, . .	0	1	0	0	1	6
Defence, answer, or first paper for each defender or set of defenders, or compareer or set of compareers, in any action,	0	0	6	0	1	0
Each paper or pleading, for either party, subse- quent to the first step, including objections and answers in a proof when stated in sepa- rate papers,	0	0	3	0	0	6
Appeal to the Sheriff-depute,	0	0	6	0	0	6
Receiving and marking each set of productions, except the productions lodged with the first paper for each party, for which no charge is to be made,	0	0	3	0	0	3
Extracting each decret in absence, in the abridged form,	0	1	0	0	1	6
When a decret is extracted against more defenders than one sued for a separate debt or prestation, the above fee of ex- tract to be paid on one of the debts or prestations highest in amount, and a third of the above fee for extract to be paid on each of the others, according to the amount of the claim against such defender or set of defenders.						
Extracting each decree <i>in foro</i> , in the abridged form,	0	2	0	0	2	6
If the decree, whether in absence or <i>in foro</i> , shall exceed one sheet, for writing each succeeding sheet,	0	0	6	0	0	6
Recording abridged decreets, per sheet, . . .	0	0	6	0	0	6
Indorsing decrees or warrants, and dating and recording such indorsation,	0	1	0	0	1	0
Protestations for not insisting,	0	0	6	0	0	9
Extract thereof,	0	0	6	0	0	9
Acts and commissions, first sheet,	0	0	6	0	0	9
Subsequent sheets, each,	0	0	6	0	0	6
If the proof be taken on the interlocutor allow- ing it, without extracting an act and commis- sion, there will be paid by each party leading proof,	0	0	6	0	0	9
Diligence or precept for citing parties incident- ally, witnesses or havers,	0	0	6	0	0	9

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	In Cases of £12 and under.			Above £12.		
	£	s.	d.	£	s.	d.
Second diligence,	0	0	6	0	0	9
Each deposition or declaration,	0	0	6	0	0	9
Writing each sheet thereof, after the first, when the sheriff-clerk acts as writing clerk,	0	0	6	0	0	6
The sheriff-clerk or his depute, when acting as commissioner in taking a proof, deposition of party, or declaration, will be allowed the fol- lowing fees, viz. :—						
In causes, not exceeding £8, each hour,	0	1	3			
Above £8, and not exceeding £25, each hour,	0	2	0			
Above £25, each hour,	0	2	6			
As also his clerk's fee for writing, at the rate of 4d. per sheet.						
Sequestration of a tenant's effects, or of joint tenants in one possession, viz. :—						
Warrant of sequestration, and service,	0	1	3	0	1	6
Taking the inventory, when taken by the clerk, if the rent to be secured be £12 or under :—						
Clerk and witnesses,	0	2	6			
When the rent is above £12 and does not exceed £25 :—						
Clerk and witnesses, . . . . .	...			0	3	9
When the rent is above £25 and does not exceed £50 :—						
Clerk and witnesses, . . . . .	...			0	5	0
When the rent is above £50 :—						
Clerk and witnesses, . . . . .	...			0	6	3
Writing out inventory and schedule, per sheet of each in any of the above cases, . . . . .	...			0	0	6
If the clerk and witnesses are necessarily employed more than two hours in taking the inventory, or travelling for that pur- pose, he will be allowed, in addition to the above fees, for every hour after the first two—						
Clerk and witnesses,	0	0	9	0	0	9
But under these charges for the hours after the first two, the clerk not to have in one day for himself and witnesses more than 5s.						
Warrant of sale,	0	0	6	0	1	0
Extract thereof, per sheet, when required,	0	0	6	0	1	0
Intimating sale to tax office,	0	0	6	0	0	6
The clerk, when he executes any warrant to roup, and collects the proceeds, will						

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	In Cases of £12 and under.	Above £12.
	£ s. d.	£ s. d.
be held liable for the amount of the roup roll, and will be allowed for his trouble and risk, including auctioneer's fees, as follows:—		
When the amount of the roup roll is £8 or under, he will be allowed 8s. 9d.		
When the amount of the roup roll is above £8 and does not exceed £100, he will be allowed at the rate of 2½ per cent.		
When the amount of the roup roll exceeds £100 but does not exceed £1000, he will be allowed 2½ per cent. for the first £100, and for every additional £100, or part of £100, 1½ per cent. And when the amount exceeds £1000, he will be allowed the above rates for the first £1000, and 1 per cent. for each additional £100 and part of £100.		
The above poundage to cover all charges for trouble in relation to the sale, and for collecting the proceeds, drawing advertisements and articles of roup; but the clerk will be allowed all his necessary disbursements or expenses, such as advertising, paying crier, travelling charges, &c. He will also, when the proceeds are above £20, be allowed 8s. 9d. for an assistant clerk.		
If roup be stopped after time of sale is fixed,	0 1 3	0 1 3
Receiving the report of sale, and note of the sum arising from it, and marking the same,	0 0 6	0 1 0
Allowing inspection of the same,	0 0 6	0 0 6
In sales under other warrants of the Sheriff, including poindings, the same fees to be paid as in sales under sequestrations.		
At intimating caption to compel return of a process, including dues of caption, if issued,	0 0 6	0 0 6
Enrolling a cause, to be paid by the party requiring enrolment,	0 0 6	0 0 6
When any cause at avizandum is enrolled		

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	In Cases of £12 and under.			Above £12.		
	£	s.	d.	£	s.	d.
by order of the Sheriff, the above fee to be paid by the parties equally.						
At borrowing a process, or part of a process, the clerk being for this fee bound to compare the process, both when borrowed and returned, and to mark the return,	0	0	6	0	0	6
Attending at judicial inspections or visitations, when required by the Sheriff or either of the parties, sealing up repositories, or executing any other order or warrant of the Sheriff, not otherwise provided for in this table :—						
First hour employed,	0	2	0	0	2	6
Every other hour,	0	1	3	0	2	0
Besides necessary outlays,						
Auditing accounts of expenses when remit made to the clerk :—						
In decrees in absence,	0	0	6	0	0	6
In litigated cases, when the amount of the account rendered is under £5,	0	1	9	0	1	9
When £5 and under £10,	0	2	6	0	2	6
When £10 and under £20,	0	3	6	0	3	6
When £20 and under £40,	0	5	0	0	5	0
When £40 and under £60,	0	6	0	0	6	0
When £60 and under £80,	0	7	6	0	7	6
When £80 and upwards,	0	10	6	0	10	6
Caveat,	0	0	6	0	0	6
Precepts or warrants of arrestment, when contained in the summons,	0	0	3	0	0	3
When not contained in the summons,	0	0	9	0	1	0
At loosing an arrestment in either case,	0	0	9	0	1	0
Each bond of caution and relative certificate,	0	2	6	0	3	9
Edict or summons of curatory, or for giving up inventories,	0	1	3	0	1	3
Calling in court, receiving and entering the nomination of curators,	0	2	6	0	2	6
Docquetting and signing tutorial or curatorial inventories, per sheet of each duplicate,	0	0	3	0	0	3
Extract acts of curatory, or upon production of inventories :—						
First sheet,	0	2	6	0	2	6
Every other sheet,	0	1	3	0	1	3
Second extracts, per sheet,	0	1	3	0	1	3
Production of a bill of advocacy, and marking the same, including trouble of transmitting the process when necessary,			0	2	6

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	In Cases of £12 and under.	Above £12.
	£ s. d.	£ s. d.
Transmitting extracted processes, in consequence of a warrant from the Court of Session or the Sheriff,	0 0 9	0 1 3
Appeal against a decree or sentence of the Sheriff to the Court of Justiciary or Circuit Court, or answers thereto,	0 1 0	0 1 3
Searching for a process in which no procedure has taken place for a year, if search does not exceed five years, and no extract ordered,	0 0 6	0 1 0
Each additional year after the first five in which the search is made,	0 0 3	0 0 3
For each consignment of money in the clerk's hands, if under £10,	0 1 3	0 1 3
And an additional fee for the amount above £10 at the rate of 5s. on each £100 consigned.		
On the lodging of a bank-receipt, when money ordered to be consigned is lodged in a bank instead of being consigned,	0 1 3	0 1 3
The fees in these three last articles not to be chargeable on proceeds of rousps or sales conducted by the clerks.		
Each warrant to uplift consigned money,	0 1 3	0 1 3
Full extract, or second extract, or authenticated copy of a process or part of a process, or other procedure or paper, when required by a party and furnished by the clerk, per sheet,	0 0 6	0 0 9

Note.—In all cases where the conclusions are *ad factum præstandum*, or not entirely pecuniary, the highest class to be the rate of charge; but fees on papers in summonses of removal or rejection to be charged according to the rent of the subject from which the defender is summoned to remove or to be ejected.

	£ s. d.
Recording Hornings, inhibitions, interdictions, lawburrows, with their executions, discharges, and other writings recorded in the Registers of Hornings and inhibitions, per sheet,	0 0 10
First or subsequent extracts thereof, when required, per sheet,	0 0 9
Recording bonds, tacks, dispositions, and other writings in the register of deeds and probative writs, per sheet,	0 0 9
First extracts of such deeds or writings, when required, per sheet,	0 0 6

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	£	s.	d.
Subsequent extracts, per sheet,	0	0	9
Recording protests on bills, including extract,	0	1	3
Subsequent extracts,	0	0	9
Recording accounts, states, and the like, per sheet of figures,	0	1	0
Extract thereof, per sheet,	0	0	9
Inspection of records of entailed vouchers,	0	0	6
Searching the record of hornings or inhibitions, including minute book, each year or part of a year,	0	0	3
In all not exceeding,	0	3	9
Searching for deeds recorded for the first year, or part of the year specified,	0	0	6
Every additional year,	0	0	3
Certificate of search, if required,	0	1	3
Inspection of records when a party or his agent makes the search, each record book and corresponding minute book,	0	1	3
Examinations under the Bankrupt Act, when the Sheriff-clerk acts as clerk to the examination, each diet,	0	3	9
Writing declarations or oaths therein, per sheet,	0	0	6

SERVICES.

General Service :

Procuring the brieve executed, and intimation to agent,	0	1	9
Attending in court at service, framing and recording the minutes, and instrument money,	0	3	6
Fees of the service,	0	10	0
Engrossing the retour,	0	2	6

Special Service, or Service as Hair of Provision :

Procuring the brieve executed, and intimation to agent,	0	1	9
Attending in court at service, framing the minutes, and recording; first sheet,	0	3	0
Each other,	0	1	0
Framing the retour, each sheet,	0	7	6
Each other sheet,	0	5	0
Engrossing the retour, each sheet,	0	1	0
Extracts from the record of service, when required, each sheet,	0	1	0

Infestments :

Drawing Instruments of Sasine on	} 250 Words per sheet,	
Chancery Precepts, first sheet,		0 7 6
Each subsequent sheet,		0 5 0
Extending the same, first sheet,		0 1 6
Each subsequent sheet,		0 1 0
Besides the stamped vellum or parchment.		
And that the clerk receive for taking infestment thereon, when the rent of the property does not exceed £100 per annum,		0 10 6
£100 and not exceeding £200,		1 1 0
£200 and not exceeding £500,		1 11 6

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	£	s.	d.
£500 and not exceeding £1000,	2	2	0
And for every additional £1000,	0	10	6
But not to exceed in all,	5	5	0
And if the distance exceed three miles, each additional mile, until it exceeds ten miles,	0	2	6
But under this charge not to receive more per day than, Besides travelling charges,	1	1	0
Extracts of minutes of procedure of freeholder meetings when required, per sheet,	0	1	3
Each person taken the oaths to Government, when the oaths are not administered at a county meeting,	0	1	0
Certificate thereof, when required,	0	1	6
Qualifying a Peer to vote at an election,	1	1	0
Extract of the fiars, each year,	0	0	9
Receiving each precept from the Court of Session, making up the list of jury, and instructing officer to summon, and making return,	0	2	6
Receiving countermand of trial, and instructing officer,	0	2	6
Writing and booking each necessary letter,	0	1	3
Each duplicate and copy,	0	0	6

Fees for Public Business payable in Exchequer:

For the principal precept of intimation of election of a Mem- ber of Parliament, besides expense of printing,	0	10	6
Writings relative to elections of Members of Parliament (ex- clusive of the precept), to summoning the Commission- ers of Supply for laying on the land-tax, and to other pub- lic business payable in the Exchequer, each sheet,	0	1	0
When consisting of more than one sheet, each additional sheet,	0	1	6
Superintending the execution of Chancery precepts, and re- turning the execution, for each precept,	0	0	6
Superintending the publication of royal proclamations or writs, each	0	5	0
Warrant to summon jury and witnesses for striking the fiars and making list, and instructing officer to summon them,	0	10	6
Attendance at striking the fiars, and writing the evidence and procedure, and recording the verdict,	1	11	6
To the sheriff-clerk for instructing the persons employed in taking up the lists of jurors, receiving the returns, and en- grossing the lists in the jury books, for each 100 names, exclusive of printing,	0	5	0
To the district clerk, or other person having local know- ledge, for attending and assisting the Sheriff at revis- ing lists, at the rate of 21s. per day, including travel- ling charges and postages,			

N.B.—The sheet of writings to be computed at three hundred words, when not otherwise specified; but if the writing does not contain three hundred words, to be charged as one sheet;

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and if after finding the sheet or sheets which any such writing shall comprise, calculated at the rate aforesaid, any number of words less than three hundred words shall remain, such fewer words shall be charged as a sheet. Although the fees for recording hornings, inhibitions, deeds, and other writings in the registers of hornings and inhibitions, and of deeds and probative writs, are to be paid for at certain rates for every sheet, yet it is understood that the clerks are to frame those records so as to contain in each sheet the number of words prescribed by the regulations of the Lord Clerk Register.

The fees in the above table to be paid, though the duty be performed by the clerk-depute or by an assistant clerk, and to be exclusive of postages and outlays.

The fees in criminal and any other business to be subject to the regulation of the Lord High Treasurer or Commissioners of Her Majesty's Treasury, or any three of them, from and after the passing of this Act.

ACT OF SEDERUNT for regulating the Form of Process in Sheriff-courts, prepared in terms of the Act of 1st and 2d Vict., c. 119, § 32.—Edinburgh, 10th July 1839.

The Lords of Council and Session, taking into consideration an Act passed in the first and second year of the reign of Her present Majesty Queen Victoria, cap. 119, intituled, an Act to regulate the Constitution, Jurisdiction, and Forms of Process of Sheriff-courts in Scotland; together with the Reports laid before Parliament by the Commissioners appointed under the sign-manual of His late Majesty King William the Fourth, dated 6th June 1833, and 16th August 1834; and considering that it was provided by the said statute (§ 82) that the Sheriffs of Scotland should meet from time to time, from and after the first week of the winter session commencing in November 1838, and should submit to this Court, on or before the first day of January 1839, such propositions as they should think ought to be enacted by Act of Sederunt for the regulation of Sheriff-courts; which propositions were to be sent to the Sheriff-courts, to be exhibited there for the time therein mentioned; after which the said Sheriffs were directed to prepare a revised draft of the said propositions for the consideration of this Court, on or before the 12th day of March 1839; and this Court was authorized and empowered, on due consideration of the said draft, to pass an Act of Sederunt in such terms as the Court should think fit: And the whole of these proceedings having been followed out in the manner prescribed by the statute, as appears from the reports of the Sheriffs hereto annexed; and the Lords having maturely considered the said draft and revised draft, and the suggestions by the Sheriffs, and

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by the Procurators in their courts, and others, in relation thereto, do hereby enact and declare,

That the following form of Process in Civil Causes before the Sheriff-courts shall be established and observed from and after the commencement of the winter session of the Sheriff-courts next following the date of this Act:

And that, with regard to all actions at present in any Sheriff-court, or which may be brought into court prior to that time, the form of process hereby established shall be observed, in so far as is consistent with justice and the convenience of parties.

PART I.—OF ORDINARY CIVIL ACTIONS.

Chap. I.—*Diets and Sessions of Court.*

1. Each Sheriff-court, except those held at a place where an ordinary Sheriff-substitute does not reside, shall sit for the dispatch of ordinary business at least one day in every week during the summer and winter sessions: such day to be fixed by the Sheriff in each county by a regulation of court.

2. The winter session shall commence, at the latest, on the 15th of October, or first ordinary court-day thereafter, and shall continue, until the 4th day of April inclusive, except during the Christmas recess, which must not be longer than three weeks. The summer session shall commence on the first court-day after the 15th of May, and continue until the last court-day in July.

8. It shall be competent for each Sheriff to extend the duration of the sessions by a regulation of court, and, in particular, to appoint court-days during the vacations. And in case there shall be any arrear of business undisposed of by the Sheriff, it shall be his duty, from time to time, to appoint additional

court-days, whether in time of session or vacation, for the purpose of disposing of such arrear (1st and 2d Vict., c. 119, § 17).

4. During the vacations, summary applications shall be received, and interlocutors in summary cases shall be dated and entered in the court-book, or diet-book, as in time of session.

5. The Sheriff of each county shall, before the termination of each session, appoint at least two court-days during each vacation, the first towards the middle, the last towards the end of the vacation, for the dispatch of all ordinary business, including the calling of new causes; and papers appointed to be put into process on these days must be lodged with the sheriff-clerk, before the hour of meeting of the court.

6. For seven days after each of these days, and after the last court-day of each session, it shall be competent to sign interlocutors in ordinary causes.

7. The reclaiming days shall run during the vacation.

Chap. II.—*Form of the Summons.*

8. All defenders shall be cited upon a summons, signed on each page by the clerk, fully libelled, and having the name of the pur-

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suer's procurator marked on the back.

9. Not more than six defenders, on separate grounds of action, shall be included in one libel, except in actions of multiplepoining, maills and duties, poinding of the ground, and forthcoming.

10. The summons must contain a concise and accurate statement of the facts, and must also set forth, in explicit terms, the nature, extent, and grounds of the complaint, or cause of action, and the conclusions deduced therefrom;—where an account is founded on, it shall be sufficient to refer to it by

the first and last dates. The summons must bear a *partibus* for calling;—the sums concluded for must be marked in figures on the margin;—the true date of signing must be filled up;—and the clerk is discharged from calling any summons that is not marked and signed as directed.

11. No libel shall be amended after citation is given thereon, except by authority of the Sheriff.

12. Every libel or summons may also contain a warrant for arresting the defender's effects and debts, on the dependence.

Chap. III.—*Execution of the Summons.*

13. The officer who executes the summons, shall deliver to the defender, if he find him, personally, —or, if he do not find him, shall leave at his dwelling-place,—a full copy of the summons to the will, with a copy of citation, in presence of one witness. When a libel is amended in absence of the defender, a copy of the amendment must be served upon him in the same manner, and on the same *inducia*, as the original libel. If there be more defenders than one, each shall be served with a copy of the libel, or of such part thereof as concerns himself. In actions of poinding the ground, maills and duties, and forthcoming, the tenants and arrestees shall be served with short copies of citation, and the proprietor and common debtor with a full copy of the libel to the will. All copies of summonses served shall be signed on each page by the officer.

14. Edicts for choosing curators, summonses for curators giving up inventories, multiplepoinings, transferences, transumps, wakenings, and cognitions, may be executed by delivering a copy of cita-

tion before one witness, containing the names and designations of the pursuer and defender, and bearing the extent and special grounds of the pursuer's claim, without any copy of the summons.

15. All executions or returns shall be signed by the officer and the witness who was present at the execution, and shall specify whether the citation was given to the defender personally or otherwise; and if otherwise, shall specify particularly the mode of citation.

16. If any defender amenable to the jurisdiction of the Sheriff in whose court the summons is raised (1st and 2d Vict., c. 119, § 24), be not resident within that sheriffdom, he may be cited by warrant of the said Sheriff, provided the same be indorsed by the sheriff-clerk of the sheriffdom within which the defender resides.

17. Where an officer returns an irregular or defective execution, he shall be liable to the party who employed him in damages, which it shall be in the power of the Sheriff to award summarily in the course of the process; and such officer may also be punished as

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the Sheriff shall think the case merits.

18. If the officer executes the warrant of arrestment, contained in the summons, by arresting the defender's effects, he must forth-

with return an execution of arrestment to the clerk.

19. The name of the pursuer's procurator shall be marked on the back of the copy of the libel, and on the citation left for the defender.

Chap. IV.—*Diet of Compareance.*

20. All summonses shall contain a warrant for citing the defender to compare on the seventh day next after the date of citation, if a court-day, or, if not, on the first court-day thereafter (except in the cases after-mentioned), with continuation of days; and the citation shall be conform to such warrant.

Note.—It is recommended that a note of the days of the week on which the ordinary courts are held, should be printed or

written at the foot of all copies of citations.

21. In the case of libels or edicts for choosing curators, and of summonses for giving up inventories, the defenders shall be cited to appear on the tenth day after the date of citation, if a court-day, or, if not, on the first court-day thereafter, with continuation of days.

22. When the defender is a minor, his tutors and curators shall be called edictally upon the same *inducie* as the principal defender.

Chap. V. *Calling of the cause, and non-compareance of the defender.*

23. The summons may be called upon the day to which the defender has been cited—namely, the seventh day, if a court-day, or upon the first court-day thereafter, and the pursuer, at the calling, must, along with his summons, produce the deeds, accounts, and other writings on which he founds, so far as the same are in his custody, or within his power, or state where he believes them to be, in which case the Sheriff may grant him a diligence for recovering them.

24. If the defender be absent at the calling of the cause, the Sheriff may either hold him as confessed and decern, or allow such competent proof in support of the libel as the pursuer or his procurator shall require, or the Sheriff may deem necessary; but before proceeding

in the proof, it must be shown to the Sheriff, or Commissioner taking the proof, that regular notice of the appointment for proof has been given to the defender. (See § 115, *infra*.) And the defender shall not be reponed against the decree in absence, or interlocutor allowing the proof, unless he shall apply to have the decree or interlocutor recalled, as hereinafter directed, by a petition, accompanied with defences prepared in terms of Chapter VII., §§ 32 and 33, and shall consign in the hands of the clerk of court the expenses incurred, as modified on taxation—(1st and 2d Vict., c. 119, § 18)—and the Sheriff shall have power to award to the pursuer such part of the expenses consigned as he may judge reasonable.

Chap. VI.—*Protestation by the defender for not insisting.*

25. Upon the day of compareance, or any subsequent court-day

during the currency of the summons, if the defender produce the

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copy thereof given to him, and if the pursuer fail to appear and insist, the defender may crave protestation for not insisting, which the Sheriff shall admit, and modify the protestation-money, according to circumstances, so as to indemnify the defender for his trouble and expenses, besides the dues of extract.

26. No protestation shall be extracted till the expiry of seven free days after the day on which the same was granted, excepting in cases where arrestments have been used, when the protestation may be extracted and given out on the lapse of 48 hours. The protestation, when extracted, may contain a precept of poinding and arrestment for recovery of the protesta-

tion-money, and the dues of extract.

27. If protestation be not extracted, the pursuer shall be allowed to call and insist in his action without a new citation, upon paying over to the defender or his procurator, or, in his absence after due intimation or refusal to accept, consigning in the clerk's hands, for the defender's use, the sum awarded in name of protestation-money, except the expense of extract.

28. In case the protestation be extracted, the instance shall fall, and the defender shall not be obliged to answer, except upon a new summons, and citation on the ordinary *inducia*.

Chap. VII.—*Procedure when appearance is made for both parties.*

29. The defender or his procurator, if prepared, may give in his defences to the libel at the calling of the cause; but if he crave to see the libel, in order to state his defences, the defences shall be lodged on or before the seventh day thereafter, and if such seventh day be a court-day, before the hour of meeting of the court; with power to the Sheriff to appoint an earlier or a later day, when, from the nature of the case, he may see cause to do so.

30. A procurator appearing for a defender must produce, along with his defences, either a written mandate from the defender, or the copy of citation given to the defender.

31. When there are more defenders than one appearing by different procurators, the procurator for the pursuer shall make out a copy or copies of the summons, or an excerpt or excerpts thereof, applicable to the case of each defender or set of defenders appearing by one procurator, which shall be

signed and certified by the clerk of court, and given out for stating defences, and the clerk shall retain the original summons; and in all the future procedure the process shall be given out to the procurators for the defenders respectively, according to their order in the summons, who shall each be allowed to see the same for such time as the Sheriff shall think proper.

32. Upon the day appointed the defender shall give in all his defences, both dilatory and peremptory.

He shall in the *first* part of his defences meet, in their order, the statements of fact in the summons, by admitting or denying the same, either absolutely or with qualifications, but without argument; and with such explanations in point of fact, applicable to each averment, as are necessary to make his answers intelligible; and shall also set forth articulately, without argument, the facts on

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which he may found a separate substantive plea in law; and in the *second* part of his defences he shall subjoin, under distinct heads, a summary of all the defences or pleas in law which he is to maintain, with such argument as he may think fit.

33. Along with his defences, the defender must produce the deeds or writings on which he founds, so far as the same are in his custody or within his power, and if they are not within his custody or power, he shall state where he believes them to be, and crave a diligence for recovering them.

34. In actions of removing, and in summary applications for ejection, the defender shall come prepared with a cautioner for violent profits, at giving in his defences or answers, unless he instantly verify a defence excluding the action.

35. The defences, when given in, shall be seen, and replies lodged, on or before the seventh day thereafter; and if such seventh day be a court-day, before the sitting of the court; with power to the Sheriff to appoint a later or an earlier day if he see cause. If, however, the parties are ready to close the record upon the summons and defences alone, or on these papers, along with a minute by the pursuer, written on the summons, and simply admitting or denying the statements in the defences, it shall not be necessary to lodge replies, and it shall be competent for the Sheriff to close the record accordingly in manner hereinafter directed.

36. In the *first* part of the replies the pursuer shall commence by setting forth articulately, and in substantive propositions, without argument, the whole facts on

which he founds, which facts must be comprehended under the general statement in the summons; and he shall then meet, in their order, articulately and without argument, the statements of fact in the defences, by admitting or denying the same, either absolutely or with qualifications, and with such explanations in point of fact, applicable to each averment, as are necessary to make his answers intelligible; and, in the *second* part of the replies, he shall subjoin, under distinct heads, a summary of the pleas in law which he is to maintain, with such argument as he may think fit.

37. When the replies are given in, the Sheriff shall proceed to advise the pleadings; and it shall be in his power, if he see cause, to allow the defences to be amended, in which case he shall particularly specify, in his interlocutor or note, the points on which amendments are required, and such amendments, whether consisting of answers to the pursuer's statements, or to his pleas in law, shall be strictly confined to the points so specified, and shall be made on, or subjoined to, the original defences, with reference to their proper heads, and in the same form and manner in all respects as is hereinbefore prescribed for preparing defences.

38. If dilatory defences have been stated, they shall be immediately disposed of by the Sheriff, unless he thinks that, either from their being connected with the merits, or on any other ground, they should be reserved till a future stage of the cause.

39. No reclaiming petition against any judgment repelling the dilatory defences shall be allowed; but if the judgment has been pronounced by the Sheriff.

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substitute, the defender may appeal to the Sheriff.

40. If the Sheriff sustain the dilatory defences, or any of them, he shall at the same time determine the matter of expenses; but if he repel the dilatory defences, the cause shall then proceed in its due course of preparation.

41. If it shall appear to the Sheriff, after the dilatory defences (if any have been proponed) are disposed of, that the grounds of action on the merits, as set forth in the summons, are in terms not sufficiently positive and clear, or that the conclusions are not regularly or clearly deduced; he may either dismiss the action, decerning for expenses if he shall see cause, and reserving to the pursuer the right to bring a new action, if otherwise competent; or he may allow an amendment of the libel, and give interim decree against the pursuer for the expenses incurred by the incorrect form of the summons; and the amendments as approved shall be written on the original summons, and authenticated by the subscription of the clerk.

42. If the defences or replies be not prepared in the manner hereinbefore directed, the Sheriff may order the same to be withdrawn, and correct defences or replies, as the case may be, to be given in; and he may give interim decree against the party in fault for the expenses thus occasioned.

43. If it shall appear to the Sheriff, that the summons, defences, and replies, set forth fully the facts respectively founded on, and sufficiently bring out the merits of the cause, he shall require the parties, within a time to be specified, to state whether they are willing to hold their said pleadings as containing their full

and final statement of facts; and if they agree so to do, they shall, within the said time, set forth their assent to that effect in a note subjoined to their respective pleadings, or written on the interlocutor sheet, or minutes of process, and subscribed by them or their respective procurators; and the Sheriff shall then close the record by writing the words "record closed," and dating and subscribing the same.

44. If the parties do not, within the time specified, state whether they are willing to hold their said pleadings as containing their full and final statement of facts, the Sheriff shall be entitled to close the record in the same manner, and to the same effect, as if the parties had expressly agreed.

45. If either of the parties shall state that he does not agree to hold the summons, defences, and replies, as sufficiently setting forth the facts respectively founded on, or if it shall appear to the Sheriff that the record cannot properly be closed without alterations on, or additions to, those pleadings, he shall ordain the parties, or their procurators, to attend him on such day as he shall appoint, for the purpose of adjusting the record, intimating at the same time by a note, or in such manner as he may think proper, the points to which he wishes their attention to be directed. At this meeting, or at any adjournment thereof which the Sheriff may think reasonable, the parties or their procurators may propose any alterations on, or additions to, the defences or replies; which alterations or additions shall be written by them on the original defences or replies, in such mode and form as the Sheriff shall allow. And if the Sheriff shall then be of opinion that the record may be closed, and the parties, or their

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procurators, are willing to close it, they shall set forth their assent to that effect in a note subjoined to their respective pleadings, or written on the interlocutor sheet, or minutes of process, and subscribed by them or their respective procurators; and the Sheriff shall then close the record by writing the words "record closed," and dating and subscribing the same.

All alterations or additions made on the margin of the record at any period before it is closed, shall be authenticated by the initials of the Sheriff.

46. If the parties fail to attend the meeting so appointed, or if any party be absent, and the party present shall consent to close the record, it shall be competent for the Sheriff to do so, in the same manner, and to the same effect, as if both parties had expressly agreed; or otherwise to appoint a new meeting for adjusting and closing the record, with certification.

47. If at the meeting it shall appear to the Sheriff that, from the intricacy of the case, or any other cause, the record cannot properly be closed, or if both parties shall decline to close, the Sheriff shall order a condescendence (from either of the parties) and answers, within such time as he may think proper.

48. If one party shall be willing to close, while the other declines to do so, the Sheriff shall have power to close the record if he deems it expedient; but in the event of his allowing a condescendence in consequence of such declination, when he would otherwise think it unnecessary, he shall find the party so declining liable in such part of the previous expenses as he may think reasonable, for which he shall grant interim

decree; and he shall then order a condescendence and answers; and it shall not be competent for the clerk to receive the paper of the party who so declined to close until certified that the said expenses have been paid.

49. In the condescendence, the party shall, without argument, in substantive propositions, and under distinct heads or articles, set forth the whole facts and circumstances pertinent to his case, which he avers and offers to prove, and shall state, at the end of each article, the specific mode of proof.

50. In the answers, the respondent shall, articulately and without argument, admit or deny, either absolutely or with qualifications, each separate averment in the condescendence, setting forth in his admission or denial such explanations in point of fact as are necessary to make his answer intelligible. If the respondent, besides his answers to the averments in the condescendence, has to aver any facts or circumstances pertinent to the case on which he founds a separate substantive plea, he shall set them forth without argument, in substantive propositions, and under distinct heads or articles, and shall state at the end of each article the specific mode of proof.

51. The parties shall subjoin to their condescendence or answers a note of the whole pleas in law on which they respectively found. They shall also produce therewith all writings in their custody, or within their power, not already produced, on which they mean to found; but when books of business are founded on, excerpts therefrom may be produced in the first instance, the books themselves being produced in the course of the proof if required. If the writings are not in

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their custody or power, they shall take a diligence for their recovery, or report any diligence previously granted.

52. If the answers contain a separate statement of facts, the condescender shall be entitled to subjoin to his condescendence articulate answers thereto, with any plea or pleas in law which may thence arise; but otherwise he shall not be entitled to make any alteration on his condescendence until the parties meet before the Sheriff, as hereinafter provided.

53. If the Sheriff think that any of the parties has either stated in the condescendences or answers allegations which ought to have been brought forward in the previous pleadings, or has improperly withheld writings, or other documents, which ought to have been previously produced, he may find the party in fault liable in the whole or such part of the expenses previously incurred by the other party as may appear proper, and give interim decree therefor.

54. As soon as the condescendence and answers, prepared in the manner before directed, are lodged, the Sheriff shall order the parties, or their procurators, to attend him on such day as he shall appoint, for the purpose of adjusting and closing the record; intimating, if necessary, at the same time by a note, or in such manner as he may think proper, the points to which he wishes their attention to be directed. At this meeting the parties or their procurators may propose any alterations on, or additions to, the condescendence and answers; which alterations or additions shall be written by them on the original condescendence and answers, in such mode and form as the Sheriff shall allow; after which, or if the parties or any of them be absent,

it shall be competent for the Sheriff to close the record, whether the parties are willing or not, by writing the words "record closed," and dating and subscribing the same; and all alterations or additions made on the margin of the record before closing shall be authenticated as hereinbefore directed.

55. If in the summons, defences, and replies, or in the condescendence and answers, a statement of fact within the opposite party's knowledge be averred by one party and not denied by the other, the latter shall be held as confessed.

56. When the record has been closed in any of the modes above-mentioned, no new averments of fact, amendment of the libel, or new ground of defence, or productions within the power of the party, shall be allowed or received, under the exception of *res noviter veniens ad notitiam*, or of facts emerging since the record was closed.

57. When the Sheriff shall see cause, he may order written pleadings on the relevancy of the allegations in the record.

58. It shall be competent to either party, before final judgment in a cause, to apply either by motion in court, or by a short note without argument, for leave to lodge a statement of any matter of fact or document *noviter veniens ad notitiam*, or emerging since the record was closed. The Sheriff shall thereupon appoint the said party, within a time to be specified, to give in a condescendence, stating, in the first place, the facts which he alleges to have newly come to his knowledge or to have emerged since the record was closed; and, secondly and *separatim*, setting forth the circumstances under which they have only recently come to his knowledge or emerged; and shall.

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if he see cause, appoint the other party, within a specified time, to answer the latter part of the said condescendence: And upon the said answers being given in, the Sheriff shall, either upon proof or otherwise, determine whether or not the said matter, as *res noviter veniens ad notitiam*, or as having emerged since the record was closed, ought to be added to the record, and shall pronounce an interlocutor accordingly, at the same time determining, or specially reserving, the point of expenses. And in case he shall be of opinion that the said facts ought to be added to the record, he shall appoint the opposite party to answer the first part of the said condescendence; and the Sheriff shall thereafter of new close the record upon these additional papers.

59. The Sheriff shall, by a special order, fix the time within which each paper shall be lodged, except in so far as hereinbefore or after provided; and the clerk shall not receive them after the time so fixed except by consent of the opposite agent, written thereon and subscribed by him. Nor shall the time for so lodging papers be in any case prorogated except by the Sheriff, on cause shewn, and on payment of an amand, or of the whole or part of the expenses previously incurred, if the Sheriff shall think proper. If the party shall fail to lodge any paper ordered within the time originally fixed, or afterwards prorogated, the Sheriff may close the record, and either give judgment, allow a proof, or otherwise dispose of the cause as he shall think fit.

60. When it shall appear to the

Sheriff that all the facts requisite to the decision of the cause are ascertained so as to render any proof unnecessary, he may proceed to decide the cause without farther argument, or he may order memorials, or minutes of debate, if he see cause.

61. It shall be competent to the pursuer, before any interlocutor of absolvitor is pronounced, to enter on the record an abandonment of the cause, on paying full expenses to the defender, and to bring a new action, if otherwise competent.

62. In pronouncing judgment on the merits, the Sheriff shall also determine the matter of expenses, in so far as not already settled.

63. All pleadings shall be subscribed by the party himself (he being answerable as to their being in regular form, and containing nothing improper or disrespectful to the court), or by a procurator of court, or other person legally authorized to act; and shall state the name and designation of the person by whom they are drawn, otherwise they shall not be received.

64. No petition, memorial, minute, note, protest, or written pleading, other than those which are expressly allowed by the present regulations, shall, without previous permission by the Sheriff, be received by the clerk.

65. It shall be the duty of the Sheriff to enforce, in the strictest manner, the present regulations, by ordering peremptorily all such pleadings as are not in terms thereof to be withdrawn, and also, if necessary, by imposing amands, or awarding to the opposite party expenses, to such an extent as may seem expedient and proper.

Chap. VIII.—*Appointments on parties to confess or deny, and judicial examination of parties.*

66. When the record shall have | been closed, or at such earlier stage

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of the cause as to the Sheriff shall seem proper, he may order both parties, or either of them, between and a certain day, by a writing under their hands, to confess or deny facts specified by the Sheriff, or to attend personally for examination, and answer such interrogatories as the Sheriff or commissioner shall think proper; and if the party fail to comply with such order within the time assigned, he shall be held as confessed to such

extent as the Sheriff may think just, and decree may thereupon be pronounced, reserving to the Sheriff to reponne him upon cause shown, and on payment of such amand or expenses as the Sheriff may think proper.

67. All such examinations shall take place in presence of the Sheriff; but when he cannot attend, or in cases of special emergency, he may appoint a commissioner.

Chap. IX.—*Proof and circumduction.*

68. If the facts are not sufficiently ascertained, the Sheriff shall allow a proof of such facts averred in the record as he may deem necessary; and it shall be the duty of the Sheriff or his substitute to take the proof; but when this cannot be done without interfering with more important duties, which cannot be delegated, a remit may be made to a commissioner.

69. When the Sheriff considers it necessary to grant act and commission, the clerk shall only extract so much of the process as relates to the points on which the proof is to be taken; but it shall not be necessary to take out such extract if the proof is to be taken within the county. The commissioner, if the proof is to be taken within Scotland, shall either be the clerk of court, his acting depute, a practitioner before any court of law of at least three years' standing, a justice of the peace, or other magistrate.

70. If the mean of proof be by writings alleged to be in the other party's hands, a day shall be assigned to that party for producing them, or to depone thereanent, as in an exhibition; or a diligence may be granted against him as a haver; and in case he shall fail to exhibit or depone on the day ap-

pointed, he shall be held as confessed upon the point offered to be proved by such writings.

71. When the mean of proof is by writings not in the party's hands, or by witnesses, a day shall be assigned for recovery of such writs, or for proving by witnesses, and diligence shall be granted to that effect, to be reported against the day assigned. (*Vide infra*, § 126, as to cases where the claim exceeds £40.)

72. Witnesses and havers residing in another sheriffdom must be cited in the terms and under the provisions of 1st and 2d Vict., c.119, § 24.

73. The evidence of any witness about to leave Scotland, or whose testimony is in danger of being lost on account of extreme old age or dangerous sickness, may, upon application in a depending process, be taken to lie *in retentis*. The party, if required by the Sheriff, must instruct the fact alleged as the cause of the application. In case of old age, a certificate to that purpose must in general be exhibited; and in case of sickness, the certificate of a physician or surgeon, or of the minister of the parish, must always be produced. If such proof is applied for before the record is closed, the party shall specify in the application the fact or

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facts on which the witnesses are to be examined.

74. It shall be in the power of the Sheriff or commissioner taking the proof to order to witnesses such expenses as shall seem just, to be paid by the party adducing them or his procurator. The dues of oaths must be paid by the party requiring them.

75. If havers or witnesses within the county, who have been cited on *induciae* of not less than forty-eight hours, do not appear upon the day to which they are cited, and if no satisfactory reason be assigned for their non-attendance, second diligence shall be granted at the party's instance for apprehending and imprisoning them, until they find caution, under such penalty as may be fixed by the Sheriff, to appear at the subsequent diets of proof when required; and which diligence shall always be reported on the day assigned for that purpose, either along with the witnesses, or with an execution by an officer, bearing that they have been searched for, and could not be found. The Sheriff, when taking a proof himself, or on report of the commissioner, shall decide whether witnesses not appearing on the day to which they were first cited should be entitled to expenses, or should be liable in the expense of second diligence, and execution thereof, or fined for their contumacy. (See on this subject, 1st and 2d Vict., c. 119, § 24.)

76. Before proceeding in any proof, the diet for which has been fixed in absence of either party or his procurator, it must, if required, be shown to the Sheriff or commissioner taking the proof that notice of the appointment to prove has been made to that party or his procurator in terms of the interlocutor allowing the proof; and the

Sheriff or commissioner, in taking a proof or declaration, or an oath of party on reference, may, notwithstanding the absence of one of the parties or his procurator, proceed with the proof.

77. Such incidental debates as arise during the examination of a party, or in the course of a proof, shall be considered as closed by a short written statement of the grounds of objection, with answers thereto, unless otherwise appointed by the Sheriff; and these objections and answers, as also any further debate thus allowed, shall be taken down on separate papers referred to, and not engrossed, in the proof, unless otherwise ordered by the Sheriff or commissioner. No reclaiming petition shall be competent against any judgment pronounced in the course of taking a proof: but all such judgments shall be subject to review by appeal to the Sheriff-substitute or Sheriff, without prejudice to the right of further appeal from the judgment of the Sheriff-substitute to the Sheriff, as in other cases. When the Sheriff or commissioner repels an objection to a witness or to an interrogatory, it shall be his duty to proceed with the examination, and in all other cases it shall be competent to him to do so; and he shall have power in any case to order the proof, subject to such objection, to be sealed up if he shall see cause. All questions arising in the course of a proof may be disposed of in time of vacation.

78. When a witness is brought forward by one party, he shall be subject, at the same diet, to examination in chief by the adverse party, and to cross examination by both parties, the adverse party paying his proportion of the expense of such examination.

79. When the proof is by oath

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of party, a day shall be assigned for his appearing and deponing. Such oath shall be taken by the Sheriff, but if he cannot attend, or in any case of special emergency, he may appoint a commissioner. If the party fail to appear upon the day assigned, and if no satisfactory reason be given for his absence, and the Sheriff do not see cause to prorogue the diet, the term shall be circumduced against him, and he shall be held as confessed, and either decerned against or avizandum made with the cause, as the nature of the case may require.

80. When any fact has been referred to oath of party, if, before emitting the oath, another mean of proof be demanded, it shall not be allowed, except upon the person who made the reference previously paying the expense which the other party has been put to by this change of procedure, as the same shall be modified by the Sheriff.

81. Upon the day assigned for reporting the diligence or commission, the party who obtained it shall report the same. If he do not, the other party may crave circumduction; and the term shall be circumduced unless sufficient cause for not reporting be shown to the Sheriff, who may prorogue the term upon payment of part of the expenses, or without any such condition, as he may think proper. When a cause is at proof on commission, it shall not be put to the roll until the term for proving is expired, unless, from circumstances occurring in the course of the proof, it becomes necessary to enroll the cause to have the Sheriff's directions thereanent.

82. No party shall be reponed against a circumduction, or against a holding as confessed, except upon cause shown to excuse his former

failure, and upon payment of such sum as the Sheriff shall modify for indemnifying the other party.

83. When a proof is reported and an interlocutor pronounced thereon, no further proof shall be allowed, except upon very weighty reasons shown, and upon payment to the other party of such a sum for expenses as the Sheriff shall determine. When such farther proof is applied for, the facts, and the witnesses by whom they are to be proved, must be particularly condensed on in the petition craving the additional proof.

84. In all cases where the oath of party is required, the party by whom the reference or deference is made must either subscribe, along with his procurator, the paper in which the requisition is made, or sign a separate writing to that effect, to be produced along with the paper, or judicially adhere to the reference or deference in presence of the Sheriff, or of the commissioner.

85. When proof, either by oath of party or by witnesses, is concluded and reported, the Sheriff shall proceed to advise the cause, unless he shall deem it necessary, either from the intricacy of the proof or the importance of the cause, to appoint memorials or minutes of debate upon the proof, or upon the whole cause.

86. These memorials or minutes shall not contain any quotation from the proof, or any of the writings in process, except when absolutely necessary; but reference may be made to the parole proof by the page, and by the letters of the alphabet (which, for that purpose, shall be put on the margin of the proof), and to the written evidence by the pages.

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Chap. X.—*Of statements of Accounts, and Reports on Remits.*

87. It shall be competent to the Sheriff, when he sees cause, to order either or both parties to give in full and complete statements of accounts, and thereupon to order objections and answers, and afterwards he may allow the parties to revise those papers by making alterations or additions on them in such mode or form as he shall direct; which alterations or additions shall be such only as are rendered necessary by new statements or arguments in the paper of the opposite party.

88. When the Sheriff sees cause, he may, either before or after the record is closed, appoint visitations and inspections, or remit to accountants, auditors, inspectors, or other persons of skill, to report, and to prepare and lodge plans,

where necessary; and the reporters may afterwards be required to verify their reports upon oath.

89. The Sheriff may allow objections to, or observations on, the report and answers, and thereafter may allow these papers to be revised, under the provisions contained in section 87.

90. The expense of these remits and reports shall, in the first instance, be paid by the parties' procurators jointly, unless the Sheriff shall in particular cases see reason to order otherwise. But the expense of accountants' reports shall not be chargeable against the agent unless so arranged. The fees of auditing shall in the first instance be paid by the party whose account is taxed.

Chap. XI.—*Improbation of Writs and Executions.*

91. Improbation against executions of process, or against any writs founded on by either party, shall not be received unless proposed by the party who makes the challenge, or by his procurator specially authorised for that purpose by a written mandate, and upon consignation of a sum not exceeding five pounds, nor under ten

shillings, as the Sheriff shall modify, to be forfeited to the other party in case the proponer shall afterwards pass from or fail in his improbation, besides being liable in the expenses and damages which shall be awarded against him at the conclusion of the cause, and other legal consequences of failing in the improbation.

Chap. XII.—*Oath of Calumny.*

92. If at any time the oath of calumny be insisted for when the party from whom it is demanded is not present, it shall not be allowed unless upon consignation of a sum not exceeding forty shillings, nor under five shillings, to be fixed by the Sheriff, and, if he see cause,

to be forfeited to the other party in case the oath is afterwards passed from, or is negative, besides payment of what shall be awarded by the Sheriff as travelling charges, and other expenses, occasioned by the oath of calumny being insisted on.

Chap. XIII.—*Reclaiming Petitions.*

93. Every reclaiming petition must recite *verbatim* the interlocutor reclaimed against, and bear upon the margin the true date of

that interlocutor, and must be drawn in the terms specified in Chap. IX., sect. 86.

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94. In all cases, the interlocutor pronounced on advising a reclaiming petition, whether agreeing with or varying from the interlocutor reclaimed against, shall be final, without prejudice to either party craving the judgment of the Sheriff by appeal.

95. Reclaiming petitions, in ordinary actions, shall be lodged with the clerk, and marked on the back by him on or before the fourteenth day after the date of the interlocutor, excepting in actions of removing and aliment, in which actions, reclaiming petitions must be lodged on or before the seventh day after the date of the interlocutor. The clerk is enjoined not to receive any petition after the expiry of those days respectively. Answers to reclaiming petitions, if ordered, must be

lodged within the same number of days as the petitions respectively, unless otherwise ordered by the Sheriff.

96. When any party desirous of reclaiming against an interlocutor, is prevented by another party having borrowed the process, it shall be competent for him, within the reclaiming days, to present a *pro forma* petition, praying for leave to lodge an additional petition; and upon a certificate thereon, subscribed by the Clerk, that the petitioner has been thus prevented, the Sheriff may, if he see cause, allow such additional petition to be lodged within such period as he may think proper.

97. No new production shall be received, either with a reclaiming petition or the answers.

Chap. XIV.—*Appeal to the Sheriff.*

98. Parties thinking themselves aggrieved by any judgment of the Sheriff-substitute, whether interlocutory or final, except in the cases otherwise provided, may, on or before the seventh day after the date of the interlocutor, apply for the opinion of the Sheriff by appeal. But when the decree may be extracted in a shorter time, the appeal must be made within the days of extract. The appeal must be made by a motion in Court, or by a minute without argument, referring, by date, to the interlocutor appealed from, and craving the opinion of the Sheriff on the whole or any part of such inter-

locutor. It shall be competent to the Sheriff-substitute to refuse to allow the appeal against any interlocutor which, in his opinion, ought to be carried into immediate effect.

99. It shall be competent for the Sheriff, when the case is before him on appeal on any point, to open up the record *ex proprio motu*, if it shall appear to him not to have been properly made up.

100. No reclaiming petition against the judgment of the Sheriff pronounced on appeal shall be competent, whether such judgment affirm or alter the judgment of the Sheriff-substitute.

Chap. XV.—*Of Actions of Wakening.*

101. When a process is allowed to lie over for year and day, the party desirous to awaken and insist in it must raise a summons of

wakening in the usual form, unless both parties or their procurators agree, by a written consent, to the cause being wakened.

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Chap. XVI.—*Multiplepoundings.*

102. When a multiplepounding is raised in the name of the holder of a fund by one of the claimants, it shall be served on the nominal pursuer as well as upon the other claimants, and an execution of such service shall be returned along with the executions of citation.

103. When the person possessed of the fund *in medio* is the real pursuer, he shall state in his summons, or in a precise and articulate condescendence to be lodged at the calling, the amount, and particulars thereof, and also any claim or lien which he may think he has thereon; and when he is only the nominal pursuer, he shall, either at the first calling of the cause or on or before the seventh day thereafter, and if such seventh day be a court-day, before the meeting of the court, give in such a condescendence, or lodge objections as his defences against the summons served as a claim upon him; otherwise he shall be held as confessed, or a condescendence of the fund *in medio* may be ordered from any of the claimants.

104. The claimants in a multiplepounding shall state their respective claims in the form of condescendences, with the conclusions to be drawn from the facts so stated

in the shape of notes of pleas, producing therewith their grounds of debt and other writings for instructing their claims; and it shall be competent to the Sheriff, if he see cause, to appoint the creditors to meet and choose a common agent, who shall prepare and lodge a state of the claims and preferences, putting his objections as therein stated to each or any of the claims in the form of answers to a condescendence, with a note of pleas; and, *quoad ultra*, the duty and nature of his office shall be similar to that of a common agent in a process of ranking and division in the Court of Session; and if no common agent shall be appointed, the parties shall be required to revise their condescendences, each being allowed to state, in a note annexed to his condescendence, his objections to any other claim or claims, in the form of answers to a condescendence, with a note of pleas; and the Sheriff, if he see cause, may order these several papers to be revised, and the case shall be proceeded with in a manner as nearly as possible approaching to that hereinbefore shewn in regard to ordinary actions.

. Chap. XVII.—*Expenses.*

105. The sum of expenses to be given in any decree, whether in absence or *in foro*, shall always be taxed before extract.

106. In all cases where a decree is given for expenses, the Sheriff, if he see cause, may, upon the application of the procurator who conducted the suit, allow the decree for expenses to go out and be extracted in the name of such procurator.

107. Although a party has been

found entitled to expenses generally, he shall not be allowed to include in his account the expense of any particular part or branch of the litigation in which he has been unsuccessful, or which has been occasioned by his own fault.

108. Where expenses have been imposed on any party by an interlocutor pronounced during the progress of the cause, no claim for repetition thereof shall be competent at the end of the cause.

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109. It shall be competent for either party, within forty-eight hours after an account has been taxed, to lodge a note of specific objections to such taxation, which the Sheriff shall dispose of, with or without answers, as he shall see cause. No reclaiming petition

shall be competent against any interlocutor regarding the taxation or modification of accounts of expenses; nor shall any appeal be competent against any such interlocutor unless lodged within forty-eight hours from its date.

Chap. XVII.—Sec. II.—*Taxation of procurators' accounts.*

110. In order to provide an easy method by which the accounts of practitioners, as between agent and client, may be checked and liquidated, it shall be competent either to the client or to the agent to present a summary application to the Sheriff before whom any cause may depend, or may have depended, to get the account claimed by the agent audited and taxed; such application shall be served on the party, and on its being produced in court, with a service of intimation of at least seven days, it shall be forthwith granted; and the said account shall thereupon be audited and taxed, and the parties shall have it in their power to state ob-

jections to the report, all in manner before provided.

111. The sum so ascertained as the amount of the account shall form the only charge against the client, and a precept or decree, on a charge of fifteen days, may issue therefor: Provided always that the judgment of the Sheriff shall be liable to review in common form.

112. The said application may be presented either during the dependence of a process, or after it is out of court by an extracted decree; but it shall not be competent where liability for payment of the account is disputed by the client, in which case the agent shall be bound to proceed by an ordinary action.

Chap. XVIII.—*Extracting the decree, and reponing against decrees in absence.*

113. Decrees may be extracted after the expiry of six free days from the day when the interlocutor is pronounced on the merits (forty-eight hours having also expired after the modification of expenses in litigated causes), except in those cases where extract shall be superseded by the Sheriff, or where he shall find it expedient to allow extract immediately, or within a shorter time than six free days. But decrees of removing, other than those obtained under the provisions of 1st and 2d Vict., c. 119, §§ 8 to 14, may be extracted forty-eight hours after the interlocutor is signed.

114. When a party shall intimate in writing to the clerk of

court that he intends to advocate the cause, and shall therewith lodge a bond of caution for such expenses as have been incurred in the Sheriff-court, and as may be incurred in the Court of Session, fifteen days in the ordinary case, and thirty days in causes before the Courts of Orkney and Shetland, shall be allowed, after final judgment, to apply by note of advocacy to the Court of Session before extract shall be competent; but on the elapse of the foresaid terms respectively, if no note of advocacy shall have been intimated to the clerk of court, he may give out the extract on the application of either party; it being competent, however, to intimate a sist or note of advocacy at any time before

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the decree has been actually extracted.

115. Where decree in absence in any civil cause shall have been pronounced or extracted in any Sheriff-court other than in causes in, the Small Debt court, or in processes of removing raised under authority of the Act 1st and 2d Vict., c. 119 (§ 18), a petition may be presented to the Sheriff-court in which such decree was pronounced to be reponed against the said decree and any letters of horning or charge following thereon, where the same shall not have been implemented in whole or in part, and, on consignation in the hands of the clerk of court of the expenses incurred, as the same may be modified on taxation, the Sheriff shall repon the defender, and revive the action or proceeding in which such decree

had been pronounced, as if decree had not been pronounced or extracted, and shall have power to award to the pursuer such part of the expenses consigned as he may judge reasonable; and the Sheriff shall pronounce such order for intimation to and for appearance of the opposite party as may be just; and such order may be executed against a person in any other county as well as in the county where such order is issued, the same being previously indorsed by the sheriff-clerk of such other county, who is hereby required to make and date such indorsation; and such order being so made and executed all further orders and interlocutors in the cause shall be sufficient and effectual, and the cause shall be proceeded with in common form.

Chap. XIX.—*Suspensions in Sheriff-courts.*

116. Where a charge shall be given on a decree of registration proceeding on a bond, bill, contract, or other form of obligation, registered in any Sheriff-court books, or in the books of Council and Session, or any others competent, or on letters of horning following on such decree, for payment of any sum of money not exceeding the sum of twenty-five pounds of principal, exclusive of interest and expenses (1st and 2d Vict., c. 119, § 19), any person so charged may apply by petition to the Sheriff-court of his domicile for suspension of said charge and diligence, on caution: and on sufficient caution being found in the hands of the clerk of court for the sum charged for, and interest and expenses to be incurred in the Sheriff-court, the Sheriff shall have power to sist execution against the petitioner, and to order intimation of the petition of suspension, and

answers to be given in thereto, and thereafter to proceed with the further disposal and decision of the cause, in like manner as in summary causes in such court, and to suspend the charge and diligence so far as regards the petitioner; provided that the said order for intimation and answers as aforesaid may be made and carried into execution against any person in any other county as well as in the county where such order is issued, in manner and to the effect hereinafore provided. (*Vide* sect. 16.)

117. If any petition of suspension as aforesaid shall be presented in any Sheriff-court, and a preliminary objection be made to the competency of such petition, or to the regularity thereof (1st and 2d Vict., c. 119, § 20), an appeal against the judgment of the Sheriff-substitute repelling or sustaining such objection may be taken in common form to the Sheriff, whose judg-

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ment thereon shall be final, and not subject to review either in the Circuit Court of Justiciary or in the Court of Session.

Chap. XX.—*Advocations, suspensions in the Court of Session, and sists.*

119. Any party who has given notice of his intention to advocate, and has lodged his bond of caution in terms of § 114, may be allowed to see the process until it is competent to extract the decree.

120. The leave of the Sheriff when required before advocating interlocutory sentences to the Court of Session, in terms of the Act 50th Geo. III., c. 112, § 86, must be obtained upon an application by petition. This petition must not contain any argument, but shall merely narrate the interlocutors to be advocated.

121. Where a person wishes to bring under review of the Court of Session any final judgment of a Sheriff, upon finding juratory caution only for expenses, he shall apply by petition to the Sheriff, praying that such caution may be received, which application shall be intimated to the opposite party or his agent.

122. Before any such application shall be granted, the complainer shall be required to depone at a time and place to be previously intimated to the opposite party or his agent, in order that they may have an opportunity of cross-interrogating him, if they see fit, whether he have any lands in property or life-rent, or bonds, bills, or contracts containing sums of money; and in case he acknowledge the same, he shall condescend thereon, and depone that he has no other lands, bonds, bills, or contracts containing sums of money belonging to him.

123. The complainer shall also lodge with the sheriff-clerk,—1. The bond of caution. 2. A full

118. No reclaiming petition shall be competent against the judgment of the Sheriff-substitute disposing of such objections.

inventory of his subjects and effects of every kind. 3. An enactment subjoined to the inventory, bearing that he will not dilapidate any of his property, and that he will not dispose of the same or uplift any of the debts due to him without consent of the respondent or his agent, or the authority of the Sheriff (under pain of imprisonment, or being otherwise punished as being guilty of fraud), till the advocacy be discussed, and till there be an opportunity of doing diligence for any expenses that may ultimately be found due by him.

124. Farther, the complainer shall lodge in the hands of the said clerk the vouchers of any debts due to him, and the title-deeds of any heritable subject belonging to him, so far as the same may be in his possession or within his power; and the complainer shall also grant a special disposition to the respondent (if so required), of any heritable subject he may be possessed of and an assignation of all debts or other rights due to him for the respondent's farther security; the said disposition and assignation to be made out at the expense of the respondent, and by his agent; and the same, with the said vouchers and title-deeds, if so deposited, to remain in the hands of the said clerk, subject to the directions of the Sheriff, till the advocacy be discussed.

125. Upon all this being done to the satisfaction of the Sheriff, he shall grant leave to advocate on juratory caution, and the sheriff-clerk shall certify the same.

126. In all causes originating in

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the Sheriff-court, in which the claim is in amount above £40, when an interlocutor is pronounced allowing a proof (unless an interlocutor allowing a proof to lie *in retentis*, or granting diligence for the recovery and production of papers), it shall not be competent to either of the parties to take any proof, except one allowed to lie *in retentis*, until after the expiry of fifteen free days in the ordinary case, and thirty days in cases before the Courts of Orkney and Shetland in order to give time for an advocacy, in terms of the statute 6th Geo. IV., c. 120, § 40; and unless the passing of a note of advocacy shall be duly intimated within the said periods of fifteen and thirty days respectively, the proof shall proceed; provided always that by agreement of parties the proof may be taken without such delay.

127. When the certified notice of a note of advocacy, under the hand of the depute or assistant clerk of Session, required by the Act 1st and 2d Vict., c. 86, § 1, has been received by the sheriff-clerk, he shall mark the said notice, and furnish a certificate to the party producing the same, and all farther proceedings in the Sheriff-court shall then cease.

128. The said note of advocacy and notice shall immediately be intimated to the adverse party by delivering to him, or his procurator, a copy of the same; and a certificate of intimation shall be indorsed on the said note by the advocator's agent. The process shall then be produced by the procurator whose receipt stands for it, in order that it may be transmitted by the clerk agreeably to the Act of Parliament 1st and 2d Vict., c. 86, § 1,

and the A. S., 17th January 1797 (*Note*.—"In a sealed cover, with a full inventory thereof signed by him"), and minuted as having been sent; and failing his producing the process, the Sheriff may grant caption for recovering it, and enforce such fine for non-compliance with this regulation, as to the Sheriff shall seem reasonable.

129. If a remit on a note of suspension of a decree in absence be pronounced in terms of the Act of Sederunt, 11th August 1787, the charger's procurator shall be allowed to see the note, and remit thereon, and shall, within six days, return the same to the clerk of court, with an account of the expense incurred in the first process, decree, and charge thereon, and also the expense incurred in the Bill Chamber. These expenses shall be taxed and modified, and an order made on the suspender to pay or consign the same within eight days; and against this order no reclaiming petition or appeal shall be allowed. If the sum modified be not paid or consigned in eight days, the process shall be transmitted to the Sheriff, who may allow the diligence to be put to further execution; and no petition shall be received against this last judgment unless the petitioner consign with the petition the modified expenses.

130. In all advocations of interlocutors pronounced by Sheriffs, it shall be competent for the Sheriff to regulate, in the meantime, on the application of either party, all matters respecting interim possession, having due regard to the manner in which the interests of the parties may be affected in the final decision of the cause.

Chap. XXI.—*Appeals to the Circuit Court of Justiciary.*

181. In civil causes appeals to | the next Circuit Court, in terms of

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the Acts 20 Geo. II., c. 43, 31 Geo. II., c. 42, and 54 Geo. III., c. 67, are competent only after a final judgment has been pronounced, and the matter of expenses has been disposed of, and where the subject matter in the suit does not exceed in value £25 sterling.

182. The appeal may be taken in open court at the time of pronouncing the judgment, or within ten days thereafter, by both lodging the appeal in the clerk's hands and serving the other party or his procurator in the cause with a copy thereof; and both the lodging and

service must take place not only within ten days after the date of the judgment, but also fifteen days at least before the diet of the Circuit Court.

- 183. At the time of entering the appeal, or within the said ten days, the complainer must lodge in the hands of the clerk a bond, with a sufficient cautioner for answering and abiding by the judgment of the Circuit Court, and for paying the costs, if any shall be by that court awarded; and if no bond has been lodged, the clerk may give out the extract.

Chap. XXII.—*The Poor's Roll.*

184. As parties, from poverty, are sometimes unable to pursue or defend any civil or criminal action, the procurators of court shall annually appoint one or more of their number to act as procurators for the poor *gratis*, such appointment to be approved of by the Sheriff.

185. Application for the benefit of the poor's roll shall be made by petition, along with which there shall be produced a certificate, signed by the minister of the parish, or by the heritor on whose lands the pauper resides, or by two elders, bearing that it consists with their personal knowledge that the person prosecuted, or who means to bring the action, is not possessed of funds for paying the expense thereof. This petition shall be remitted to the procurators for the poor, who shall intimate the petition to the other party; and after hearing both parties, or inquiring into the case, report their opinion

specially to the Sheriff, whether the petitioner has a *probabilis causa litigandi*. On considering which report, the Sheriff shall either refuse the petition, or remit to one of the procurators for the poor, who shall attend to and conduct the cause to its final issue, though he cease to be one of the agents for the poor; and the pauper shall not be liable in payment of any of the dues of the court, or fees to the procurator, or to the officer, except actual outlay, unless expenses shall be awarded and recovered in the process. No person except the procurators for the poor shall conduct any such case. It shall be in the power of the Sheriff, at any time when he sees cause, to deprive a party of the benefit of the poor's roll.

186. It shall be in the power of the Sheriff, on cause shewn, to relieve the procurator for the poor from paying the expenses of witnesses.

PART. II.—OF SUMMARY APPLICATIONS, ARRESTMENTS, &c.

Chap. I.—*Summary Applications, how and in what cases to be allowed.*

187. In all cases which require extraordinary dispatch, and where

the interest of the party might suffer by abiding the ordinary in-

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ducia, application by summary petition may be made to the Sheriff, who, on considering the petition, may, if he see cause, order it to be served on the person complained of, and to be answered within such *inducia* as the Sheriff in each case may think proper. And the procedure in such cases shall not abide the ordinary course of the court-days, it being always competent to pronounce such interim order as the exigencies of the case require.

138. It shall be no objection to such application that it contains a conclusion for a claim of damage, or other claim arising out of the subject-matter thereof; and it shall be competent for the Sheriff to discern for such claim as in an ordinary action.

139. The officer serving and intimating such petition shall give to the defender, or leave for him at his dwelling-place, in presence of one witness, a full copy of the petition and deliverance, with a citation and requisition, and return an execution subscribed by himself and the witness.

140. The petition must be prepared in all respects in terms of section 10; and the prayer thereof must set forth specifically and in explicit terms the remedy craved. The answers must be prepared in terms of sections 32 and 33.

141. If answers are not lodged within the time appointed, the clerk, on production of the warrant and a regular execution, shall certify that answers are not lodged, and thereon the Sheriff shall grant the desire of the petition, or pronounce such other judgment as he shall see fit.

142. When answers have been lodged, the process shall be given

out to the pursuer, to reply within such number of days as were allowed for answering, unless the Sheriff see cause to fix an earlier or later day. The replies must be prepared in terms of section 37.

143. In cases where the defender has lodged answers by the time appointed, but the petitioner has either failed to report the warrant and execution or to reply within the time allowed, the process may be forced back by a caption, in order that the case may be laid before the Sheriff; or, in the respondent's option, protestation may be granted, and the petition be dismissed with expenses.

144. Reclaiming petitions must be lodged on or before the seventh day after the date of the interlocutor; and the clerk is enjoined not to receive any petition after that day; and answers to reclaiming petitions, if ordered, must be lodged within the same number of days, unless otherwise ordered by the Sheriff.

145. Summary cases shall proceed and be conducted in terms of the regulations, and subject to the compulsitors provided in the case of ordinary actions in all particulars, except as above specified.

146. Decrees in summary cases may be extracted in terms of sections 113 and 114; but warrants to roup, and other such warrants requiring speedy execution, may be extracted immediately after being pronounced, unless otherwise ordered by the Sheriff, or unless due intimation has been given of the intention to reclaim or advocate; it being competent to the Sheriff to regulate, in the meantime, on the application of either party, all matters regarding interim possession, as in section 130.

Chap. II.—*Actions of Removing and of Aliment.*

147. Actions of removing and of aliment, brought in the form of a

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summons, are to be entitled to the privileges of summary processes in every respect. See other regulations as to these cases in sections 34, 95, 113.

148. For regulations regarding removings from premises let for less than a year, and at rents not exceeding the rate of £30 a-year,

see 1st and 2d Vict., c. 119, § 8 to § 14.

149. No appeal to the Sheriff shall be competent against judgments of the Sheriff-substitute in cases of summary removings under the said act, except when they have been remitted to the ordinary roll.

Chap. III.—*Sequestrations for Rent.*

150. When a petition for sequestration is presented, the Sheriff may pronounce an interlocutor sequestrating the crop, stocking, and effects, and grant warrant to take an inventory thereof, and ordain the petition and warrant to be served on the tenant, and him to give in answers thereto within such *inducia* as to the Sheriff shall seem proper. If no answers are lodged within the time assigned, the Sheriff, on production of the executions of sequestration and service of the petition on the defender, may grant warrant of sale. Every warrant to sell sequestrated effects shall be carried into execution at the sight of the clerk of court, or other person authorised by the Sheriff; and in every case where a sale follows on such warrant the sale shall be reported within fourteen days after the date of the roup; and the principal roup-rolls, or copies regularly certified, must,

within the same period, be lodged in process, together with an account of the expenses incurred in the sequestration and sale, and also a state of the debt due by the defender, showing the difference between the debt and the proceeds of the effects sold.

151. In petitions for sequestration it shall be competent to conclude for payment of the rent, and decree may thereupon be pronounced for the same and expenses, or for such balance as may remain due after sequestration and sale, and under deduction of the expenses thereof, under the provisions of the foregoing section.

152. It shall be competent to the Sheriff, on cause shown, at any stage of the proceedings, to appoint a fit person to take charge of the sequestrated subjects, or to require caution from the tenant that they shall be afterwards made forthcoming.

Chap. IV.—*Arrestments.*

153. The clerk is authorised to issue precepts of arrestment, upon there being produced to him a libelled summons, not containing a warrant of arrestment, or a petition with pecuniary conclusions. The precept shall always set forth the ground of application for the arrestment; and no blank warrant of arrestment shall be granted upon any pretence whatever.

154. If the pursuer shall use ar-

restment on a libelled summons (1 & 2 Vict., c. 114, § 17), the same shall be effectual, provided the warrant of citation shall be executed against the defender within twenty days after the date of the execution of the arrestment, and the summons be called in court within twenty days after the diet of comparance, or, when the expiry of the said period of twenty days falls within the vacation, pro-

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vided the summons be called on the first court-day thereafter, whether such court-day be one of those hereby authorised to be held in vacation (§ 3), or in the ensuing session; and if the warrant of citation shall not be executed, and the summons called in manner above directed, the arrestment shall be null, without prejudice to the validity of any subsequent arrestment duly executed in virtue of the said warrant.

155. Any warrant or precept of arrestment granted by any Sheriff,

whether contained in a libelled summons, or proceeding upon a depending action or liquid document of debt (1 & 2 Vict., c. 114, § 19), may lawfully be executed within the territory of any other Sheriff, the same being first indorsed by the sheriff-clerk of such sheriffdom, who is required to make and date such indorsation.

156. For regulations regarding the recal or restriction of arrestments by the Sheriff, see 1 & 2 Vict., c. 114, § 21.

Chap. V.—*Members of Court.*

157. No person shall be permitted to practise as a procurator in any Sheriff-court unless he be a writer to the signet or a solicitor before the Supreme Courts, or have been admitted a procurator, and have practised as such before some Sheriff-court, or have served three years as an apprentice to a writer to the signet, to a solicitor before the Supreme Courts, or to a procurator before any Sheriff-court in Scotland, or court of royal burgh, or to a sheriff-clerk, be twenty-one years of age, and be regularly admitted by the Sheriff without prejudice to the legal rights of chartered bodies.

158. Any agent in the Court of Session proposing to practise before a Sheriff-court in applications for

the benefit of *cessio*, in terms of 6 & 7 Will. IV., c. 56, or in any proceeding not competent in a Sheriff-court before the passing of the 1st & 2d Vict., c. 119, shall produce to the clerk of court sufficient evidence of his being duly qualified to practice as an agent before the Court of Session.

159. Procurators of court and agents qualified as above and resident within the jurisdiction of the court, shall alone be entitled to borrow any process, by themselves, or their clerks duly authorised, and for whom they shall be responsible by the ordinary compulsitors of the law.

160. The sheriff-clerk, or his deputy, shall not act, either directly or indirectly, as a procurator.

PART III.

Chap. I.—*Consistorial and Maritime Causes.*

161. The form of process in consistorial and maritime causes shall be the same, as nearly as possible,

with that in ordinary actions before the Sheriff-court.

Chap. II.—*General Regulations.*

162. In all defending causes, the interlocutors of court must be written on a separate sheet or sheets of

paper, and not on the pleadings of the parties.

163. In every process there shall

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be an inventory to accompany it, in which every paper given in shall be entered, with its corresponding number, by the party who lodges it. The sheriff-clerk shall mark all pleadings and productions (or when several productions are lodged at once, the inventory thereof), with the date of lodging the same; and shall also keep another inventory, in terms of 1 & 2 Vict., c. 119, § 16.

164. The sheriff-clerk, or his deputy, shall keep a transmission-book, in the form of schedule (B) annexed to the Act 1 & 2 Vict., c. 119; and he shall, besides, insert therein two columns to show the date of the Sheriff's receiving each process and of his returning it ad-

vised, in terms of § 16 of the said Act.

165. The sheriff-clerk shall take up a roll of motions on the enrolment of any of the parties, which shall be called on each court-day. And each Sheriff shall make such regulations with reference to the roll, and to the court-book or diet-book, as are applicable to the circumstances of his county.

166. It is hereby declared that the term Sheriff in the present Act of Sederunt shall include Sheriff-substitute in all cases, except in such passages as relate to appeal from the Sheriff-substitute to the Sheriff; or where, from the context, it is obvious that *this* is not intended.

The Lords appoint this Act, and the Appendix thereto, to be inserted in the Books of Sederunt, and published in the usual manner.

C. HORNE, *J.P.D.*

APPENDIX.

The Committee on the Forms of Process appointed at the meeting of Sheriffs held on the 14th of November last, in terms of the Act of 1st and 2d Vict., c. 119, § 82, beg to report, that they have repeatedly and very carefully revised the Act of Sederunt 1825, keeping in view the suggestions contained in the Report of the Law Commission, and the communications which they have received; and have prepared a Draft of an amended Act of Sederunt, which they now submit to the Sheriffs. After the most serious consideration, they are of opinion that the alterations they recommend, and which embrace every thing that has occurred to them as useful, will tend to shorten and improve the procedure in Sheriff-courts.

AD. DUFF, *Chairman.*

Edinburgh, 11th Dec. 1838.

At an Adjourned General Meeting of the Sheriffs,—*Present*, Messrs Duff, Horne, Boswell, Colquhoun, Dunlop, Bruce, Walker, L'Amy, Maconochie, Murray, Cay, Tait, Miller, Jardine, Thomson, Anderson, Speirs, Currie, Hunter, Shaw Stewart, and Monteith; and at an adjournment of the said meeting, on the 17th of December, the above Report and relative Draft of an Act of Sederunt were fully considered and approved of, subject to certain alterations; and the Sheriffs remitted to the former Committee to embody these alterations in the Draft, and to take such measures as should appear to them to be expedient for fulfilling the objects of the Act 1st and 2d Vict., c. 119, § 82.

AD. DUFF, *Chairman.*

Edinburgh, 15th Dec. 1838.

Act of Sederunt, 10th July 1839.

The Committee have now to lay before the Sheriffs a Revised Draft of the Act of Sederunt regarding the Form of Process in Sheriff-courts. In preparing it, they have had before them observations and suggestions from the Sheriffs-substitute of Selkirkshire, Aberdeenshire, Caithness-shire, Nairnshire, Perthshire, and Clackmannanshire—the Sheriff-substitute and Sheriff-clerk of Dumbartonshire—the Sheriff-clerk of Kinross-shire—the Advocates in Aberdeenshire—the Procurators in Ayrshire, Caithness-shire, Fifeshire (Cupar district), Kincardineshire, Perthshire, and Forfarshire (Dundee district). They have given most careful attention to all their observations, and have adopted many of the suggestions, which they think valuable improvements. The Revised Draft has been so printed as to point out where alterations have been made.

AD. DUFF, *Chairman*.

Edinburgh, 28th Feb. 1839.

At an Adjourned Meeting of Sheriffs,—*Present*, Messrs Duff, L'Amy, Bruce, Thomson, Cay, Jardine, Currie, Hunter, Douglas, Murray, Anderson, and Tait. The meeting having reconsidered the Revised Draft of an Act of Sederunt regarding the Form of Process in the Sheriff-courts, with the proposed alterations and amendments, approve thereof, and authorize the convener respectfully to submit the same to the Court, with the whole of the observations on the former draft which had been received.

AD. DUFF, *Chairman*.

Edinburgh, 4th March 1839.

ACT of SEDERUNT as to the Form of Judgments to be pronounced in Inferior Courts in Cases of Proof.—Edinburgh, 15th February 1851.

The Lords of Council and Session taking into their consideration that by the statute 18 & 14 Vict., c. 36, § 82, it was enacted, "That in all cases of advocacy or suspension which shall come to depend before the Court of Session, where a record has been made up and closed, and a proof led and concluded before the inferior judge, the Lord Ordinary before whom such advocacy or suspension is enrolled shall, at the first calling of the cause, if a motion to that effect be made by either of the parties, appoint such record and proof, with any other papers which may be deemed to be necessary, to be printed and boxed for the Judges of the Inner-House, who shall thereupon proceed to dispose of it in the same way and manner as if it had been reported by the Lord Ordinary upon a closed record prepared in the Court of Session:"

And further, that by statute 6 Geo. IV., c. 120 (§ 40), it was enacted,

Act of Sederunt, 15th February 1851.

"That when in causes commenced in any of the courts of the Sheriffs, or of the Magistrates of Burghs, or other inferior courts, matter of fact shall be disputed, and a proof shall be allowed and taken according to the present practice, the Court of Session shall, in reviewing the judgment proceeding on such proof, distinctly specify in their interlocutor the several facts material to the case, which they find to be established by the proof, and express how far their judgment proceeds on the matter of fact so found, or on matter of law, and the several points of law which they mean to decide :"—

And deeming it expedient, with reference to the subject matter of both of these enactments, and especially to the power conferred upon the parties by that first recited, of having their causes upon proof reported directly to the Inner-House, without any interlocutor being in the first instance pronounced thereon by the Lord Ordinary, that all judgments proceeding upon proof, to be hereafter pronounced in inferior courts, should be prepared and framed in the like manner, and with the like specification in point of fact and of law, in which it would, according to the present practice and under the said second recited enactment, be incumbent upon the Lord Ordinary, in reviewing the said judgments, to prepare and frame his interlocutor :—

Do hereby enact and ordain that—

When in causes commenced in any of the courts of the Sheriffs, or of the Magistrates of Burghs, or other inferior courts, matter of fact shall be disputed, and a proof shall be allowed and taken according to the present practice, the Sheriffs or other Judges in the said courts shall, in their judgment, proceed-

ing upon such proof, distinctly specify the several facts material to the case which they find to be established by the proof, and express how far their judgment proceeds on the matter of fact so found—or on the matter of law—and the several points of law which they mean to decide.

And the Lords appoint this Act to be inserted in the Books of Sederunt, and printed and published in the usual form.

D. BOYLE, *I.P.D.*

ACT of SEDERUNT as to taking of Proofs on Commission in Sheriff-courts.—Edinburgh, 23d June 1852.

The Lords considering that it has been represented to them that a practice has been introduced in regard to the taking of proofs on commission in Sheriff-courts, whereby the depositions are taken down by clerks or others when the commissioner is either not present or is otherwise occupied, and when the depositions are not emitted before, and their tenor dictated by, the commissioner :—

Act of Sederunt, 23d June 1852.

Therefore, in order to check such irregular and illegal practice, the Lords hereby strictly prohibit any such mode of procedure,—direct the Sheriffs and Sheriffs-substitute of the different counties to take the most rigorous steps to check such a practice; to employ no commissioner who does not conduct the business in a legal and regular manner; to inquire and ascertain

in the cases now before them, in which proof has been taken or is going on, whether such proof has been to any extent taken in the foresaid illegal and irregular manner; and in all instances in which that shall be found to have been the case, to direct that no fee or remuneration shall be paid to the commissioner guilty of such irregular and illegal conduct.

And the Lords appoint this Act to be inserted in the Books of Sederunt, and to be printed and published in the usual form.

DUN. M'NEIL, I.P.D.

16 & 17 Vict., c. 80.—An ACT to facilitate procedure in the Sheriff-courts in Scotland.—15th August 1853.

Whereas an Act was passed in the first year of the reign of Her present Majesty, entitled *An Act for the more effectual recovery of Small Debts in the Sheriff-courts, and for regulating the establishment of Circuit Courts for the trial of Small Debt causes by the Sheriffs in Scotland* (7 Will. IV. & 1 Vict., c. 41); and another Act was passed in the Session of Parliament held in the first and second years of the reign of Her present Majesty, intituled *An Act to regulate the constitution, jurisdiction, and forms of process in Sheriff-courts in Scotland* (1 & 2 Vict., c. 119); And whereas it is expedient to facilitate procedure in the Sheriff-courts in Scotland, and to make further provision for the cheap and speedy administration of Justice in the said Courts: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PROCEEDINGS IN ORDINARY CAUSES.

1. With respect to cases in the Sheriff-court, other than those provided for by the first-recited Act as extended by this Act, be it enacted as follows:

[*Short form of summons.*].—The summons shall be in the form, as nearly as may be, of the schedule (A) annexed to this Act, and such short form shall be equally effectual to all intents and purposes, including arrestment on the dependence where the summons contains a warrant to arrest in terms of such schedule, as the forms at present in use.

Sheriff-court Act, 1853.

2. [*Decree in absence. Provision for reponing.*].—Where no appearance shall be entered for the defender, the Sheriff may, at any court held after the day of compareance, give decree in terms of such summons, in like manner as at present where no appearance is made for the defender, and such decree shall be in all respects equivalent to a decree in absence obtained under the forms at present in use: Provided always that the defender may obtain himself reponed against such decree, whether extracted or not, at any time before implement has followed thereon, or against such part thereof as may not have been implemented, by lodging with the sheriff-clerk a reponing note in the form in schedule (B) annexed to this Act, and consigning therewith the sum of expenses decerned for, a copy of which note shall at the same time be delivered or transmitted through the post office to the pursuer or his agent in the action, and a certificate by the sheriff-clerk that such note has been lodged shall operate as a sist of diligence; and where such note shall have been lodged and consignation made as aforesaid, the Sheriff shall pronounce a judgment reponing the defender, and shall also appoint the consigned money to be paid over to the pursuer, unless special cause be shown to the contrary, and the cause shall thereafter proceed in all respects as if appearance were made therein, in manner hereinafter provided, of the date of such judgment: Provided always that where a charge has been given, or any step of diligence has been taken on the decree prior to the application to be reponed, it shall be competent to the Sheriff in the course of the proceedings in the cause to decern in favour of the pursuer for the expense of such charge or diligence, or such part thereof as shall be just.

3. [*Procedure where defender enters appearance. Condescendence and defences to be lodged.*].—Where the defender intends to state a defence, he shall enter appearance by lodging with the sheriff-clerk, at latest on the day of compareance, a notice in the form of schedule (C) annexed to this Act: and on the first court-day thereafter, or on any other court-day to which the diet may be adjourned, not being later than eight days thereafter, the Sheriff shall hear the parties in explanation of the grounds of action and the nature of the defence to be stated thereto, and if satisfied that no further written pleadings are necessary he shall cause a minute, in the form of the schedule (D) annexed to this Act, to be written on the summons, setting forth concisely the ground of defence, which minute shall be subscribed by the parties or their procurators, and the Sheriff shall thereupon close the record by writing under the said minute “record closed,” and signing

16 & 17 Vict., c. 80.

and dating the same; but if the Sheriff shall be satisfied that the record cannot properly be made up without condescendence and defences, he shall pronounce an order for the same; and in such event the pursuer shall, within six days thereafter, lodge with the sheriff-clerk a condescendence setting forth articulately, and as concisely as may be, without any argument or unnecessary matter, the facts necessary to found the conclusions of the summons which he avers and is ready to prove, together with a note of pleas in law; and the defender shall, within ten days after the lodging of such condescendence, lodge his defences, setting forth articulately his answers to such condescendence, and also, where necessary, setting forth articulately, under a separate head, any counter-statements necessary for his defence which he avers and is ready to prove, and there shall be appended to such defences a note of the defender's pleas in law, and such defences shall be framed as concisely as may be, without any argument or unnecessary matter.

4. [*Record to be made up and closed.*].—The sheriff-clerk shall, as soon as defences are lodged, transmit the process to the Sheriff, who shall consider the same, and shall as soon as may be, and at latest within six days after the date of lodging the defences, appoint the parties or their procurators to meet him, and shall at such meeting, if dilatory defences have been stated, dispose at once, where possible, of such dilatory defences, or may reserve consideration of them till a future stage of the cause; and, unless where the pursuer is willing to close on summons and defences, the Sheriff may, if he thinks fit, order one revisal of the condescendence and defences respectively, which revisal shall be made upon the original papers, unless the Sheriff, for special cause assigned, shall direct to the contrary; and as soon as revised defences are lodged, the sheriff-clerk shall transmit the process to the Sheriff, who shall thereupon appoint the parties or their procurators to meet him as soon as may be, and at latest within six days after the date of the lodging of the revised defences; and at such meeting after the lodging of the defences, or the revised defences, as the case may be, or at an adjourned meeting, if the Sheriff has seen fit to adjourn (which he is hereby authorised to do where necessary, but for no longer period than eight days), the Sheriff shall allow the pursuer or his procurator to put upon record, in concise and articulate form, where this has not been already done, his answers to the defender's statement of facts, or a simple minute of denial where that shall be deemed by the Sheriff to be sufficient, and shall allow each party to adjust his own part of the record, and shall strike

Sheriff-court Act, 1853.

out of the record any matter which he may deem to be either irrelevant or unnecessary ; and the record shall then be closed, by the Sheriff writing upon the interlocutor sheet the words " record closed," and signing and dating the same.

5. [*After record is closed Sheriff to hear parties, or to appoint diet for proof, and to dispose of case.*].—After the record is closed, the Sheriff shall hear the parties or their procurators upon the merits of the cause, and upon their respective pleas, or, when he deems proof to be necessary, shall appoint a diet for proof on an early day, and shall hear the parties or their procurators after such proof is led ; and after such hearing, or such proof and hearing, as the case may be, the Sheriff shall pronounce judgment with the least possible delay : Provided always that it shall be competent to the Sheriff, on the written consent of both parties, to dispose of the cause upon the papers without further statement or argument.

6. [*Periods for lodging papers peremptory ; but prorogations may be granted of consent, and once on cause shown.*].—Where any condescendence or defences, or revised condescendence or revised defences, or other paper, shall not be given in within the periods prescribed or allowed by this Act, the Sheriff shall dismiss the action, or decern in terms of the summons, as the case may be, by default, unless it shall be made to appear to his satisfaction that the failure to lodge such paper arose from unavoidable or reasonable causes, in which case the Sheriff may allow the same to be received on payment of such sum in name of expenses as he shall think just : Provided always that the periods appointed for lodging any paper, or for transmitting any process to the Sheriff, or for closing a record, may always be once prorogated by the Sheriff without consent on special cause shown, and may always be prorogated by written consent of parties, with the approbation of the court ; and in every interlocutor prorogating on special cause shown the time for lodging any paper, the nature of such cause shall be set forth, and a definite time shall be therein fixed within which the paper is to be lodged.

7. [*Provision for causes commenced by petition.*].—In all applications before the Sheriff which are at present commenced by petition, and are not otherwise regulated by this Act, the petition shall be as nearly as may be in the form of schedule (E) annexed to this Act ; and thereafter the procedure under such petition shall, as nearly as may be, be the same as hereinbefore provided in regard to ordinary actions.

8. [*Procedure in multiplepoindings.*].—In actions of multiplepoind-

16 and 17 Vict., c. 80.

ing, the party raising the summons shall set forth in the body thereof who is the real raiser of the action ; and the Sheriff shall, at the first calling of the cause, where no defences are stated, or where defences are stated and repelled at the first calling thereafter, pronounce an order for claims within a short space ; and it shall be competent for any number of parties whose claims in such action depend upon the same ground to state such claims in the same paper ; and as soon as the parties who shall appear and claim an interest in the fund shall have lodged their claims, or had opportunity allowed them for doing so, the Sheriff shall appoint the parties or their procurators to meet him ; and at such meeting he shall allow each party to adjust his own part of the record, and to meet the averments of any other claimant or claimants so far as necessary, and the procedure at such meeting, and in the after progress of the cause, shall be as nearly as may be the same as is hereinbefore provided with reference to ordinary actions after defences have been lodged.

9. [*Short forms of execution provided.*].—Every execution of a summons, and every execution of service of a petition, shall be written at the end of the summons or petition itself, and where necessary on continuous sheets, but not on a separate paper ; and such execution shall be in the form or as nearly as may be in the form of schedule (F) annexed to this Act, which form shall be equally valid and effectual in all respects as the longer form of execution at present in use.

10. [*Written proofs abolished ; and proofs how to be taken. Absent or aged or infirm witnesses may be examined on commission. Remits may be made to person of skill, and, if of consent, his report shall be final.*].—Where proof shall be allowed, a diet of proof shall be appointed at which the evidence shall be led before the Sheriff, who shall with his own hand take a note of the evidence, setting forth the witnesses examined, and the testimony given by each, not by question and answer, but in the form of a narrative, and the documents adduced, and any evidence, whether oral or written, tendered and rejected, with the ground of such rejection, and a note of any objections taken to the admission of evidence, whether oral or written, allowed to be received ; which note of the evidence shall be forthwith lodged in process, and the sheriff-clerk shall mark the documents admitted in evidence, and also, separately, any documents tendered and rejected ; and the diet of proof shall not be adjourned unless on special cause shown, which shall be set forth in the interlocutor making the adjournment ; and the proof shall be taken as far as may be continuously, and with as

Sheriff-court Act. 1858.

little interval as the circumstances or the justice of the case will admit of; and the note of the evidence given by each witness shall be read over to him by the Sheriff, and signed by the witness (if he can write) on the last page in open court before the witness is dismissed: provided always that in the event of the Sheriff being unavoidably prevented from taking such notes with his own hand, he shall dictate the same to any competent person he may select: Provided always that it shall be competent to the Sheriff, where any witness or haver is resident beyond the jurisdiction of the court, or by reason of age, infirmity, or sickness, is unable to attend the diet of proof, to grant commission to any person competent to take and report in writing the evidence of such witness or haver; provided also that it shall be competent to the Sheriff to remit to persons of skill or other persons to report on any matter of fact, and where such remit shall be made of consent of both parties the Sheriff shall hold the report to be final and conclusive with respect to the matter of such remit.

11. [*Certified copy interlocutor of proof to be warrant for citing witnesses and havers, and to be operative, by simple indorsation, in other counties.*].—When a diet of proof shall be appointed by the Sheriff, a copy, certified by the sheriff-clerk, of the interlocutor fixing such diet, or of that portion of such interlocutor which relates to that matter, shall be a sufficient warrant to any sheriff-officer in *Scotland* (acting within his own county) to cite witnesses and havers, at the instance either of the pursuer or defender, to attend such proof; and such warrant shall have the same force and operation in any other county as in the county in which it was issued, the same being in every case in which it is executed in another county from that in which it is issued indorsed by the sheriff-clerk of such other county, who is hereby required to make and date such indorsation; and the citation and execution thereof shall be in the form of schedule (G) annexed to this Act; and if any witness or haver duly cited on a citation of at least forty-eight hours shall fail to appear, he shall forfeit and pay a penalty not exceeding forty shillings, unless a reasonable excuse be offered and sustained by the Sheriff, for which penalty decree shall be given by the Sheriff in favour of the party on whose behalf he was cited; and it shall be further competent to the Sheriff to grant second diligence for compelling the attendance of such witness or haver, the expense whereof shall in like manner be decerned for against the witness or haver against whom the same has been issued, unless a special reason to the contrary be stated and sustained by the Sheriff.

12. [*Written argument abolished, and oral pleadings substituted.*]

16 & 17 Vict., c. 80.

—The parties or their procurators shall be entitled to be heard orally when the cause shall be ripe for judgment, and on the import of any concluded proof, and at any other stage of the cause when argument may be necessary and shall be appointed by the Sheriff; and it shall not be competent at any stage of the cause to receive any written argumentative pleading, excepting as hereinafter provided; but the Sheriff shall, if required by either of the parties, take a note of the authorities cited in the course of the oral argument, and also, where he shall see fit, of the argument, and such note shall form part of the process.

13. [*Sheriff in deciding to state the grounds of his judgment.*].—In all cases where a Sheriff-substitute or Sheriff pronounces an interlocutor disposing of a dilatory defence or sisting process, or deciding on the admissibility of evidence or any plea of confidentiality, or giving any interim decree, or disposing in whole or in part of the merits of the cause, it shall be the duty of such Sheriff-substitute or Sheriff, as the case may be, to set forth in such interlocutor, or in a note appended to and issued along with it, the grounds on which he has proceeded.

14. [*Decree for expenses to include expense of extract.*].—Every decree for expenses pronounced after the passing of this Act shall be held to include a decree for the expense of extracting the same.

15. [*Action not prosecuted dismissed.*].—Where in any cause neither of the parties thereto shall, during the period of three consecutive months, have taken any proceeding therein, the action shall, at the expiration of that period, (*eo ipso*) stand dismissed, without prejudice nevertheless to either of the parties, within three months after the expiration of such first period of three months, but not thereafter, to revive the said action on showing good cause to the satisfaction of the Sheriff why no procedure had taken place therein, or upon payment to the other party of the preceding expenses incurred in the cause, whereupon such action shall be revived and proceeded with in ordinary form; with power to the Sheriff, if he shall see fit, to disallow such expenses, or any part thereof, in the accounts of the agent of either party against his client: Provided always that nothing herein contained shall apply to cases in which the right under such action has been acquired by a third party, by death or otherwise, within such period of six months.

16. [*Judgment of the Sheriff-substitute may be appealed against by petition or hearing. Review by Sheriff to be obtained by simple appeal.*].—Where any judgment shall be pronounced by the Sheriff-substitute which under this Act may be brought under the review of the Sheriff, the party who proposes to appeal against the same shall, within seven

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days from the date thereof, engross and sign, by himself or his agent, under the interlocutor appealed against the words, "I appeal against this interlocutor," and thereafter it shall be competent for such party to lodge with the sheriff-clerk, within eight days, a reclaiming petition against the said judgment and any prior judgment which may under this Act be then appealed, which reclaiming petition the sheriff-clerk shall forthwith transmit to the Sheriff, who may order answers thereto, and shall thereafter dispose of such appeal; or otherwise the party appealing may intimate, by notice lodged with the sheriff-clerk within the period aforesaid, his desire to be heard orally before the Sheriff on such judgment or judgments, in which case the Sheriff shall hear the parties or their procurators on such appeal, and shall dispose of the same; and the Sheriff shall have power, in cases requiring extraordinary dispatch, to order a reclaiming petition and answers instead of hearing the parties orally; but it shall not be competent in any case in reviewing such judgment both to receive a reclaiming petition and to hear the parties orally: Provided always that if no reclaiming petition shall have been lodged, and if neither party shall within the period above mentioned require to be heard before the Sheriff, he may proceed to dispose of such appeal without farther argument, and it shall be competent for the Sheriff, where the cause is before him on appeal on any point, to open up the record *ex proprio motu* if it shall appear to him not to have been properly made up.

17. [*No appeal allowed during the leading of the proof.*].—It shall not be competent, prior to the closing of the proof, to appeal to the Sheriff against any interlocutor of the Sheriff-substitute on the admissibility of evidence pronounced during the leading of the proof; but it shall be competent, on the proof being declared closed, or within seven days thereafter, to appeal against all or any of such interlocutors; and the Sheriff shall pronounce such judgment on the appeal as shall be just, and shall appoint any evidence which he may think ought not to have been rejected to be taken before the case shall be advised on its merits.

18. [*Except by persons pleading confidentiality, or objecting to production of writings.*].—Provided always that nothing in this Act contained shall preclude any person, whether party to the cause or not, who may plead confidentiality, whether with reference to documentary or oral evidence, or any person not being a party to the cause, who may object to produce writings, whether on pleas of alleged hypothec or otherwise, from taking to review any judgment of the Sheriff-substitute or Sheriff disposing of such pleas, in whole or in part; but the

16 & 17 Vict., c. 80.

judgment of the Sheriff-substitute disposing of such pleas shall only be reviewable by such person taking an appeal at the time in open court, which appeal shall be minuted by the Sheriff-substitute, and thereupon such part of the proceedings as may be necessary for the disposal of such appeal, or as the Sheriff may require, shall be transmitted by the sheriff-clerk to the Sheriff, who shall dispose of the same summarily, but may appoint a hearing before giving judgment: Provided also that no such appeals by any such person pleading confidentiality as aforesaid, or by any such person objecting to produce writings as aforesaid, shall be held to remove the cause from before the Sheriff-substitute as regards any point or points not necessarily dependent on the interlocutor or judgment appealed from; but as to all such points, the cause may be proceeded with before the Sheriff-substitute as if no such appeal had been taken.

19. [*No appeal allowed (except in certain cases) till judgment on the merits.*—Until an interlocutor shall have been pronounced disposing in whole or in part of the merits of the cause, it shall not be competent to appeal to the Sheriff against any interlocutor of the Sheriff-substitute not being an interlocutor disposing of a dilatory defence, or an interlocutor sisting process, or an interlocutor allowing a proof, or to appeal to the Sheriff against any interlocutor of the Sheriff-substitute on the admissibility of evidence pronounced during the leading of the proof, except as hereinbefore provided for; but it shall be competent in every case in which an appeal against any interlocutor is taken also to appeal against all or any of the interlocutors previously pronounced, whether before or after the date of closing the record, or whether the record has been closed or not, and the Sheriff shall pronounce such judgment on the appeal as shall be just.

20. [*Where mistakes in a judgment may be corrected without review.*—It shall be competent to any Sheriff-substitute or Sheriff to correct any merely clerical error in his judgment at any time before the proceedings have been transmitted to the judge or court of review, not being later than seven days from the date of such judgment.

21. [*Procedure in consistorial and maritime causes.*—The procedure in consistorial and maritime causes shall be as nearly as may be the same as is hereinbefore provided with reference to ordinary actions.

22. [*Judgment of Sheriff in causes not exceeding £25 to be final.*—It shall not be competent, except as hereinafter specially provided for, to remove from a Sheriff-court, or to bring under review of the Court of Session, or of the Circuit Court of Justiciary, or of any other

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court or tribunal whatever, by advocacy, appeal, suspension, or reduction, or in any other manner of way, any cause not exceeding the value of twenty-five pounds sterling, or any interlocutor, judgment, or decree pronounced or which shall be pronounced in such cause by the Sheriff.

23. [*Causes of any value may be tried in a summary way by consent of all the parties.*]—It shall be competent in all civil causes above the value of twelve pounds, competent before the Sheriff, for the parties to lodge in process a minute, signed by themselves or by their procurators, setting forth their agreement that the cause should be tried in the summary way provided in the said first-recited Act, and the Sheriff shall thereupon hear, try, and determine such action in such summary way, and in such case the whole powers and provisions of the said first-recited Act shall be held applicable to the said action: Provided always that the parties, or any of them, shall be entitled to appear and plead by a procurator of the court.

24. [*In cases exceeding £25, review limited to final judgments, &c.*]—It shall be competent, in any cause exceeding the value of twenty-five pounds, to take to review of the Court of Session any interlocutor of a Sheriff sisting process, and any interlocutor giving interim decree for payment of money, and any interlocutor disposing of the whole merits of the cause, although no decision has been given as to expenses, or although the expenses, if such have been found due, have not been modified or decerned for; but it shall not be competent to take to review any interlocutor judgment, or decree of a Sheriff not being an interlocutor sisting process, or giving interim decree for payment of money, or disposing of the whole merits of the cause as aforesaid; and the provisions of an Act passed in the fiftieth year of the reign of His Majesty King George the Third, intituled *An Act for abridging the form of extracting decrees of the Court of Session in Scotland, and for the regulation of certain parts of the proceedings of that Court*, and also the provisions of an Act passed in the sixth year of the reign of His Majesty King George the Fourth, intituled *An Act for the better regulating of the Forms of process in the Courts of Law in Scotland*, are, in so far as inconsistent with this enactment, hereby repealed: Provided always that when any interlocutor shall be brought under review of the Court of Session, it shall be competent for that Court also to review all the previous interlocutors pronounced in the cause.

25. [*Where either party desires it, case to go at once to the Inner-House.*]—All cases of advocacy which shall come to depend before

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the Court of Session may be brought, in the first instance, before one or other of the divisions of the Court of Session, or, by consent of both parties, before any Lord Ordinary in the Outer-House, in which last case the judgment to be pronounced by such Lord Ordinary shall be final, and shall not be subject to review by the Inner-House, or by appeal to the House of Lords.

26. [*Small Debt jurisdiction extended to causes not exceeding £12.*] And with respect to small debt cases not exceeding twelve pounds :

The provisions of the said first-recited Act shall be extended to all causes, prosecutions, applications for sequestration and sale, and other actions and proceedings of the nature set forth in the said first-recited Act, wherein the debt, demand, or penalty in question, or the fund *in medio*, shall not exceed the value of twelve pounds, exclusive of expenses and fees of extract ; and the said first-recited Act shall be read and construed as if the words " twelve pounds " were substituted for the words " eight pounds six shillings and eightpence," wherever these latter words occur in the said first-recited Act : Provided always that in any case in which a decree pronounced by the Sheriff in the Small Debt Court for any sum exceeding eight pounds six shillings and eight pence shall have been put to execution by imprisonment, the party so imprisoned shall be entitled to bring such decree under review of the Sheriff by way of suspension and liberation, and such suspension and liberation shall proceed in the form provided for summary petitions by this Act.

PROCEEDINGS IN SEQUESTRATIONS FOR RENT.

27. And with respect to proceedings before the Sheriff-court for sequestration and sale for recovery or in security of rents, be it enacted as follows :

[*Petition for sequestration may also conclude for payment.*].—Every petition for sequestration and sale for recovery or in security of rents, whether such petition be presented after the term of payment or *currente termino*, may contain a prayer for a decree for payment of the rent with reference to which the petition is presented, and it shall be competent to the Sheriff to pronounce, under such petition, decree for payment of such rent or any part thereof, and every such decree shall be extractable in ordinary form, and shall otherwise have the same force and effect in every respect as any decree for payment pronounced in any petition for sequestration and sale in which a decree for payment of rent might be competently inserted before the passing of this Act.

• Sheriff-court Act, 1858.

28. [*Operation of provisions in first-recited Act extended.*].—The provisions of the said first-recited Act for the summary trial and determination of sequestrations for rent where the rent or balance of rent does not exceed the sum of eight pounds, six shillings and eightpence (and which provisions are made applicable by this Act to sequestrations for rent where the rent or balance of rent does not exceed the sum of twelve pounds), are declared to extend, and the same are hereby extended, to all sequestrations applied for *currente termino* or in security.

PROCEEDINGS IN ACTIONS OF REMOVING.

29. And with respect to actions of removing before the Sheriff-court, be it enacted as follows :

[*Time within which summons may be raised.*].—It shall be competent to raise a summons of removing at any time, provided there be an interval of at least forty days between the date of the execution of the summons and the term of removal, or where there is a separate ish as regards land and houses, or otherwise between the date of the execution of the summons and the ish which is first in date.

30. [*Lease containing obligation to remove equivalent to decree of removing, provided forty days' notice be given.*].—Where any lands or heritages are held under a probative lease specifying a term of endurance, such lease, or an extract thereof from the books of any court of record, shall have the same force and effect in every respect as any extract decree of removing obtained in any ordinary action of removing at the instance of the party, granter of such lease or in the right of the granter of such lease, against the party in possession under such lease, whether such party in possession be the lessee named in such lease or not, decerning such party in possession, his family, sub-tenants, cottars, and dependants, with their goods and gear, to be removed and ejected from the said lands or heritages at the term or terms corresponding to the expiration of the term or terms of endurance specified in such lease ; and such lease or extract thereof shall, along with a written authority signed by the landlord or his factor or agent, be a sufficient warrant to any sheriff-officer or messenger-at-arms of the county within which such lands or heritages are situate to remove and eject such party in possession, and his foresaids, from such lands or heritages on the elapse of such specified term or terms respectively, and to return an execution thereof in common form : Provided always that previous notice to remove shall be given to such party in possession at least

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forty days before the expiration of the term of endurance specified in such lease, or, where the lease has a separate ish as regards land and houses or otherwise, at least forty days before that ish which is first in date, by causing to be delivered to such party in possession, or to be left at his ordinary dwelling-house, or to be transmitted to his known address through the post office, previous to the commencement of such period of forty days, a notice by a sheriff-officer of the county in which such lands or heritages are situate, or messenger-at-arms, in the form in schedule (I) annexed to this Act; and a certificate endorsed on such lease or extract that such notice has been duly given, signed by a sheriff-officer of such county or messenger-at-arms, and attested by one witness, in the form in schedule (J) annexed to this Act; or an acknowledgment to that effect endorsed thereon by such party in possession himself, or by his known agent on his behalf, shall be sufficient evidence that such notice has been given: Provided also that no such removal or ejectment by virtue of this enactment shall be competent after six weeks have elapsed from the expiration of the term of endurance specified in such lease, or, where the lease has a separate ish as regards land and houses, or otherwise after six weeks have elapsed from that ish which is last in date; and provided further, that nothing herein contained shall be construed to prevent any proceedings under this enactment from being brought under suspension in common form.

31. [*Letter of removal granted by tenant equivalent to decree of removing, provided forty days' notice be given.*—Where any tenant in possession of any lands or heritages shall, whether at the date of entering upon his lease, or at any other time, grant a letter of removal, either holograph or attested by one witness in the form in schedule (K) annexed to this Act, such letter of removal shall have the same force and effect in every respect as any extract-decree of removing obtained in any ordinary action of removing at the instance of the party to whom such letter of removal is granted, or of the party in his right against the party granter of such letter of removal, or the party in his right as tenant, decerning such party granter of such letter, or such party in his right, as the case may be, his family, subtenants, cottars, and dependants, with their goods and gear, to be removed and ejected from the said lands and heritages at the term or terms of removal respectively specified in such letter of removal; and such letter of removal shall be a sufficient warrant to any sheriff-officer of the county within which such lands or heritages are situate to remove and eject such party granter of such letter of removal, or

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such party in his right, and his foresaids, from such lands and heritages, on the elapse of such specified term or terms respectively, and to return an execution thereof in common form: Provided always that where such letter of removal shall bear date more than six weeks before the term of removal, or the ish first in date specified in such letter of removal, previous notice to remove shall be given to the party granter of such letter of removal, or to such party in his right, at least forty days before such term of removal, or where such letter of removal specifies a separate ish as regards lands and houses or otherwise, at least forty days before that ish which is first in date, by causing to be delivered to such party granter of such letter of removal, or to such party in his right, or to be left at his ordinary dwelling-house, or to be transmitted to his known address through the post office, previous to the commencement of such period of forty days, a notice by a sheriff-officer of the county in which such lands or heritages are situate, in the form of schedule (I) annexed to this Act; and a certificate indorsed upon such letter of removal that such notice has been duly given, signed by a sheriff-officer of such county, and attested by one witness, in the form of schedule (J) annexed to this Act, or an acknowledgment to that effect indorsed thereon by the granter of such letter of removal, or other party in his right, or by the known agent of the granter of such letter of removal, or other party on his behalf, shall be sufficient evidence that such notice has been given: Provided also that no such removal or ejectment by virtue of this enactment shall be competent after six weeks have elapsed from the expiration of the term of endurance specified in such letter of removal, or where such letter of removal has a separate ish as regards lands and houses or otherwise, after six weeks have elapsed from that ish which is last in date; and provided further that nothing herein contained shall be construed to prevent any proceedings under this enactment from being brought under suspension in common form.

32. [*Arrears of feu-duties for subjects of small amount may be sued for in Sheriff-court.*].—And whereas it is desirable that the jurisdiction of the Sheriff should be extended to questions relating to non-payment of feu-duties for real subjects of small amount, wherever, in subjects not exceeding in yearly value the sum of twenty-five pounds, the vassal shall have run in arrear of his feu-duty for two years: It shall be competent for the superior to raise an action before the Sheriff in ordinary form, setting forth that the subject is of the value, and that the feu-duty has run in arrear as aforesaid, and concluding that

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the vassal should be removed from his possession, and that warrant to that effect should be granted, and thereafter the cause shall proceed in the manner herein provided in ordinary actions; and if the defendant shall fail to appear, or if it shall be proved to the Sheriff by such evidence as he may require that the subject is of the value, and that the feu-duty is in arrear as aforesaid, he shall grant warrant in terms of the conclusions of the summons, which warrant shall be executed at the first term of *Whitsunday* or *Martinmas* which shall first occur, four months after the same is issued by the Sheriff, and such warrant, so executed, shall have the effect, in relation to the said possession, of a decree of irritancy *ob non solutum canonem*: Provided always that it shall be competent to the vassal, at any time within one year from the date of such removal, to raise an action of declarator in the Court of Session for vindication of such subject on any ground proceeding on challenge of the title of the superior, which shall not be called in question before the Sheriff except on grounds instantly verified by the titles of the superior, and that it shall be competent to the vassals, at any time before such warrant is executed, to purge the irritancy incurred by payment of the arrears pursued for with the expenses incurred by the superior in such proceedings; provided also that in leases for a longer endurance than twenty-one years the landlord shall have the like remedies against his tenant in case of the non-payment of rent, *mutatis mutandis*, that are hereby given to the superior against his vassal.

33. [*Libels may be written or printed, or partly both, but authenticated as libels now are.*]—And in respect of criminal prosecutions before the Sheriff, be it enacted as follows:

The principal or record copies of all criminal libels before the Sheriff-courts may be either written or printed, or partly written and partly printed, provided that the same shall be authenticated in the same manner as the written criminal libels now in use are authenticated.

34. [*Libel printed or partly printed to be inserted in record book.*]—When a criminal libel in any Sheriff-court is either wholly or partly printed, a copy of it, either wholly or partly printed, shall, instead of being copied in writing into the Record Book of Court, as at present, be inserted in such book, either in its proper place in the body thereof, or at the end of the volume wherein the relative procedure is recorded, in which last case it shall be distinctly referred to as so appended.

35. [*The will of criminal libels to contain two diets of comparance as in schedule, and accused to be called upon at first diet to plead guilty*

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or not guilty.—In the prosecution of all criminal offences which shall not be tried summarily, the will of the criminal libel shall contain two diets of comparance in the form of the schedule (L) hereunto annexed; and, at the first of such diets, which shall not be sooner than five days from the service of the libel, the court sitting in judgment shall call upon the accused party to plead guilty or not guilty to the crime of which such party may be therein accused; and if such party shall plead guilty, the court shall forthwith pronounce sentence upon such party according to the form now in use; and if the party accused shall plead not guilty, the trial of such party shall take place on the second diet of comparance set forth in the will of the libel, which second diet shall not be sooner than nine clear days after the first diet, and at such second diet the party accused shall again be called upon to plead as aforesaid, and if such party shall then plead guilty, the sentence of the law shall be forthwith pronounced according to the form now in use; and if such party shall plead not guilty, a jury shall then be empanelled, and the trial shall proceed and be followed out according to law, unless the diet shall be further adjourned or deserted according to the existing law and practice.

36. [*Sheriff not to ask party more than once to plead.*—It shall not be necessary for the Sheriff at each such diet to ask the party accused more than once whether such party pleads guilty or not guilty.

SALARIES OF SHERIFFS AND SHERIFFS-SUBSTITUTES.

37. And with respect to the salaries and remuneration of Sheriffs and Sheriff-substitutes, be it enacted as follows:

[*Salaries of Sheriffs and Sheriffs-substitute may be increased, and additional Sheriffs-substitute may be appointed.*—It shall be lawful to grant to any Sheriff such salary as to the Commissioners of Her Majesty's Treasury may seem meet, not being less than five hundred pounds by the year, and to any salaried Sheriff-substitute now in office, or to his successor, or to any Sheriff-substitute who may be hereafter appointed by virtue of this Act, such salary as to the Commissioners of Her Majesty's Treasury may seem meet, the same not in any case exceeding one thousand pounds by the year, and not less than five hundred pounds by the year; and every salary payable to such Sheriff or Sheriff-substitute shall be paid by four equal quarterly instalments out of the funds from which the salaries of Sheriffs are payable; and it shall be lawful for Her Majesty and her heirs and successors, upon the joint recommendation of the Lord Pre-

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sident of the Court of Session, Her Majesty's Advocate, and the Lord Justice-Clerk, all for the time being, to grant authority to any Sheriff to appoint one or more additional Sheriffs-substitute: Provided always that such joint recommendation shall expressly bear that the appointment of such additional officer or officers is essentially necessary for the public service; and provided also that no more than two additional Sheriffs-substitute in each county shall be appointed under the powers hereby conferred.

38. [*Provision for retiring allowance to Sheriffs and Sheriffs-substitute disabled after long service.*].—It shall be lawful for the Commissioners of Her Majesty's Treasury to grant to any person who has held, now holds, or may hereafter hold, the office of Sheriff-substitute, such annuity as is by the said second recited Act authorised to be granted in respect of long service for one or other of the periods specified in the said second-recited Act, notwithstanding such service may not have been continuous, and may have been in different counties; and the said Commissioners shall have the same powers of granting annuities to Sheriffs in respect of long service as are conferred by the said second recited Act, and by this Act with reference to Sheriffs-substitute, and such annuities shall be payable out of the funds from which the salaries of Sheriffs are payable: Provided always that no such annuity shall be granted to any Sheriff or Sheriff-substitute, unless the periods of his actual service as Sheriff or Sheriff-substitute, as the case may be, shall, when taken together, extend to one or other of the periods of service specified in the said second-recited Act; and that in computing the amount of retiring allowance of such Sheriffs, the emoluments drawn by them on average of the five preceding years shall be held to constitute their salary.

39. [*Sheriffs' salaries to be in lieu of all fees, &c.*].—The salaries henceforth to be paid to the Sheriffs and Sheriffs-substitute shall be in full of all fees and emoluments whatever.

40. [*Commissions to Sheriffs-substitute to extend over the whole county.*].—The commissions already granted or to be granted by all Sheriffs to the Sheriffs-substitute shall extend over the whole county.

41. [*Compensation to sheriff-clerks.*].—In case the operation of this Act shall affect the emoluments of any sheriff-clerk not now paid by salary, it shall be competent to such sheriff-clerks to apply to the Commissioners of Her Majesty's Treasury of Great Britain and Ireland, who shall have power, upon proof to their satisfaction of the diminution of the emoluments of such sheriff-clerks through the opera-

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tion of this Act, to award such compensation to such sheriff-clerks respectively as to the said Commissioners shall seem just ; and it shall be in the power of any such sheriff-clerk to require that he should be paid by salary, in terms of the said recited Act, first and second *Vic-toria*, chapter one hundred and nineteen ; and it shall be lawful to the Commissioners of Her Majesty's Treasury to adjust the salary of every sheriff-clerk now in office, and who is paid by salary, regard being had to the expenses of such office as may seem to them just.

42. [*Provisions for the sittings of Sheriff-courts, &c.*].—And with respect to the sittings of the Sheriff-courts, and the more efficient operation of this Act, be it enacted as follows :

[*Sheriff-courts to sit such days during session for despatch of civil business as may be fixed by Sheriff and approved of.*].—Each Sheriff-court, except those held at a place where an ordinary Sheriff-substitute does not reside, shall sit for the despatch of ordinary civil business for such number of days weekly during the session as shall be fixed by each Sheriff by a regulation of court, to be approved of by the said Lord President and Lord Justice Clerk, and to be advertised, at least once a-year, in a newspaper published in the county, or, where there is no such newspaper, in a newspaper published in some county immediately adjoining.

43. [*Sheriffs to hold three sessions in each year.*].—Each Sheriff shall hold three sessions in each year, the first of which shall commence on the fifteenth day of *January*, or the first ordinary court-day thereafter, and shall continue until the fifteenth day of *March* following, and the second shall commence on the third day or the fourth day of *April*, and shall continue until the thirty-first day of *July* following, and the third shall commence on the first day of *October*, or the first ordinary court-day thereafter, and shall continue until the fifteenth day of *December* following ; and in case at any time there shall be any arrear of business undisposed of, it shall be the duty of the Sheriff from time to time to appoint additional court-days, whether in time of session or vacation, for the purpose of disposing of such arrear.

44. [*Sheriff may act in time of vacation.*].—All summary causes may proceed equally during vacation as during session ; and it shall be competent to the Sheriff, if he thinks fit, to pronounce interlocutors in time of vacation, in all causes, whether summary or not.

45. [*Sheriff to fix one court-day in each vacation for despatch of ordinary court business.*].—The Sheriff shall, before the termination of each session, appoint at least one court-day during each vacation

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for the despatch of all ordinary civil business, including the calling of new causes and the receipt of condescendences, defences, and other papers, which, if the court had not been in vacation, would have required to be previously lodged.

46. [*Sittings to be held by Sheriffs in their counties.*].—Every Sheriff shall, unless prevented by indisposition or other unavoidable cause, hold annually in his county sittings for the discharge of the judicial business of the county; that is to say, the Sheriffs of *Sutherland, Caithness and Inverness, Ross and Cromarty, Argyle, Banff, and Elgin and Nairn*, shall hold three such sittings, and the Sheriffs of the other counties shall hold four such sittings, in the course of the year; and such sittings shall continue until the causes ready for trial or hearing when such sittings commence be disposed of; and such sittings shall, except as regards the counties of *Ross, Inverness, and Argyle*, be held at each of the places within his county at which the ordinary courts of the Sheriffs-substitute are held, and such other places as the Sheriff, with approval of the Secretary of State for the Home Department, may appoint; and, as regards the counties of *Ross, Inverness, and Argyle*, at such places as the Sheriff, with approval of the Secretary of State, may appoint: Provided always that the Sheriffs of the said three counties shall, at least twice a-year, hold one such sitting at each of the places at which the ordinary courts of the Sheriffs-substitute are held; and each Sheriff shall give due notice to the county of the times and places of such sittings, and such sittings shall take place at intervals of not less than six weeks; and each Sheriff shall, once in the year, go on the Small Debt Circuit in use to be held by the Sheriff-substitute, and shall on such occasions, in addition to holding the Small Debt Court, despatch as much of the ordinary business as may be ready for adjudication, or as time may permit; and each Sheriff shall annually, within ten days after the twelfth day of *November*, make a return to Her Majesty's principal Secretary of State for the Home Department of the number of sittings held by him, and of the periods of holding each such sitting, in the immediately preceding year, stating the cause of absence in case the sittings herein-before directed shall not have been held by him in terms of this Act; provided that none of the said provisions shall extend to the counties of *Orkney and Shetland, and Midlothian and Lanark*; and so much of an Act passed in the first and second year of the reign of Her present Majesty, intituled *an Act to regulate the constitution and jurisdiction and forms of process of the Sheriff-courts in Scotland* (1 & 2 Vict., c. 119) as relates to the courts to be held by each Sheriff-depute in his county,

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excepting the said counties of *Orkney* and *Shetland*, is hereby repealed.

47. [*Sheriff may sign Interlocutors when furth of his county.*].—It shall be lawful for any Sheriff to pronounce and sign any interlocutor, judgment, or decree when furth of his sheriffdom; and such interlocutor, judgment, or decree, shall have all the like force and effect as if pronounced and signed by the Sheriff while within the limits of his sheriffdom.

48. [*Privilege of Members of College of Justice abolished.*].—No person whatsoever shall be exempt from the jurisdiction of the Sheriff-court, in any cause, on account of privilege by reason of being a member of the College of Justice.*

49. [*Court of Session to frame Tables of Fees.*].—The Court of Session shall be and is hereby authorized and required to frame from time to time a table or tables of fees for business in the Sheriff-courts of *Scotland*, and such table or tables of fees so framed shall be submitted to the Secretary of State for the Home Department, and, if approved of, shall form the rule of professional charge for business performed in such courts.

50. [*Interpretation Clause.*].—In construing this Act, unless where the context is repugnant to such construction, the word "Sheriff" shall be held to include "Sheriff-substitute;" the word "tenant" shall include sub-tenant; and the word "lease" shall include sub-lease.

51. [*Recited Acts, &c., repealed.*].—The said recited Acts, and all laws, statutes, Acts of Sederunt, and usages now in force, shall be and the same are hereby repealed, but that in so far only as may be necessary to give effect to the provisions of this Act, and no further or otherwise.

52. [*Act to take effect from 1st Nov. 1858.*].—This Act shall take effect from and after the first day of *November* One thousand eight hundred and fifty-three.

* The Act 18 & 14 Vict., c. 86 (to facilitate procedure in the Court of Session, enacts:—

17. [*Members of College of Justice not to institute actions not otherwise competent.*].—And be it enacted that no member of the College of Justice shall, in respect of any pri-

vilege as such, be entitled to institute any action or proceeding, either original or by way of review, before the Court of Session which could not have been instituted by him before such Court if he had not been a member of the College of Justice.

 16 & 17 Vict., c. 80.

SCHEDULES referred to in the foregoing Acts.

SCHEDULE (A).

Petitory Summons.

A B, Sheriff of the county of _____ officers of court, jointly and severally: Whereas it is shown to me by *C D* [*design him*], pursuer, against *E F* [*design him*], defender, in terms of the conclusions underwritten: Therefore the defender ought to be decerned to pay to the pursuer the sum of _____ contained in a bill drawn by the pursuer upon and accepted by the defender, dated _____ and payable _____ after date, with the legal interest thereof, till payment [*or to make delivery to the pursuer of* sold by the defender to him; *or to pay to the pursuer the sum of* _____ for goods sold by the pursuer to the defender, per account commencing the _____ day of _____ and ending the _____ day of _____ annexed hereto; *or to pay to the pursuer the sum of* _____ being damages sustained by the pursuer in consequence of the defender having slandered the pursuer by stating _____ *or otherwise, according to the nature and circumstances of the action*], with expenses: And my will is that ye summon the defender to compare in my Court-house, at _____, upon the sixth day next after the date of your citation, in the hour of cause, with continuation of days, to answer in the premises; with certification in case of failure, of being held as confessed; [*and if arrestment on the dependence is required, add*] and that ye arrest in security the defender's goods, monies, debts, and effects. Given at _____ the _____ day of _____

G H, Sheriff-clerk.*Summons of Count and Reckoning and Payment.*

A B, &c. [*as before*]: Whereas, &c. [*as before*]: Therefore the defender ought to be decerned to produce before me a full account of his intromissions as cashkeeper to the pursuer [*or otherwise, as the case may be*], that the true balance due to the pursuer thereon may be ascertained; and the defender should be decerned to pay to the pursuer such sum as may be found to be the true balance on said account, with the interest which may be due thereon; and if he fail to produce such account the defender should be decerned to pay to the pursuer the sum of _____ which should in that case be held to be the balance due, with interest thereon from the _____ day of _____ with expenses: And my will is, &c. [*as before*].

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Summons of Multiplepoinding.

A B, &c. [as before]: Whereas it is shown to me by *A B* [*design him*], pursuer against *C D* [*design him*], common debtor, and *K L* [*insert names and designations of the other defenders, and state who is the real raiser*], alleged creditors of the said *C D*, in terms of the conclusions underwritten: Therefore it should be declared that the pursuer is holder of a fund in medio [*specify the amount or nature of it*], and is only liable in single payment of the said fund to those having right thereto; and the defenders should produce their claims, and the pursuer should be decerned to pay the said fund, deducting his expenses of process, in such way as may be just; and such of the defenders as shall be found to have no right should be prohibited from troubling him in time coming: And my will is, &c. [*as before*].

 SCHEDULE (B).
[*Date.*]*Reponing Note.*In the action *A* against *B*.

The defender craves to be reponed against the decree in absence, dated
[*add, where necessary, so far as unimplemented*]. The expenses decerned for are consigned with the sheriff-clerk.

A, Defender.[*Or*]*C*, Agent for defender.

 SCHEDULE (C).
*Notice of Appearance.*In the action *A* against *B*.

B [*design him*], defender, enters appearance to defend said action.

B, Defender.[*Or*]*D*, Agent for defender.

 SCHEDULE (D).
Minute at the first calling of Cause, and where Defender makes Comparance.

Edinburgh

1858

Act.

Alt.

The defender's procurator stated that the defence was [*here state succinctly the ground of defence, dilatory or peremptory, as*] no title to pursue, or prescription, or the goods specified in account libelled were not ordered or not received by defender, or compensation, conform to account due by pursuer, amounting to £
herewith produced, or the defender, who was drawer of the bill sued on, received no notice of dishonour, or otherwise, in like manner, as the case may be.

16 & 17 Vict., c. 80.

SCHEDULE (E).

Petition.

Unto the Sheriff.

 $A B \vee C D.$

Or, In the action presently before your Lordship.

A B v. C D.

The petitioner humbly sheweth,

That [here state briefly the circumstances, as] of this date
the effects of were duly sequestered, and it is now neces-
sary to sell, or whereas an action between for the price of
a horse is now depending before your Lordship, and it is expedient or
necessary to sell the said horse, or in consequence of
wrongously and unwarrantably using, or disposing of and making away
with, or encroaching on, or withholding and refusing delivery of, the
property, effects, or documents of, *as the case may be.*

May it therefore please your Lordship to grant
warrant of sale, or for delivery, or for interdict, &c. &c. &c.

SCHEDULE (F).

Form of Execution of Summons or Petition.

This summons [or petition] executed [or served] by me [insert name] sheriff-officer, against [or upon] [insert name or names] defender, [or defendants, or respondent, or respondents], [state whether personally or otherwise], in presence of [insert name and designation of witness], this day of _____ eighteen hundred and _____ years.

E F. Sheriff-officer.

L M. witness.

SCHEDULE (G).

Citation of Witnesses and Havers.

C D [design him]. You are hereby cited to attend in the Sheriff-court of the county of _____ on _____ the _____ day of _____ at _____ o'clock, within _____ to give evidence for the pursuer [*or defender*] in the action at the instance of *A [design him]*, pursuer, against *B [design him]*, defender, and that under the penalty of forty shillings sterling if you fail to attend. [*If a haver, say,*] And you are required to bring with you [*specify documents required*]. Dated this _____ day of _____

E F. Sheriff-officer.

Execution against Witnesses and Havers.

Upon the _____ day of _____ I duly cited *C D* [*design*
him] to attend in the Sheriff-court of the county of _____ on

 Sheriff-court Act, 1858.

the day of at o'clock, within
 to give evidence for the pursuer [or defender], in the
 action at the instance of *A* [design him], pursuer, against *B* [design him],
 defender. [If a haver, say] And I also required him to bring with him
 [specify documents]. This I did by delivering a just copy of citation to
 the above effect, signed by me, to the said *C D* personally [or otherwise,
 as the case may be].

E F, Sheriff-officer.

 SCHEDULE (I).

Notice to Remove.

[Place and date.]

You are required to remove from the farm of [insert name by which
 usually known], at the term of next, as to the houses and
 grass, and at the separation of the crop from the ground as to the arable
 land [or as the case may be], in terms of the lease thereof [or in terms of
 your letter of removal], dated

E F, Sheriff-officer.

[Address] *G H*, [design him],

 SCHEDULE (J).

Certificate of Notice to remove.

[Place and date.]

I, *E F*, Sheriff-officer of the county of , certify that on
 the day of notice to remove, in terms of this
 lease [or letter of removal] at next [according to the terms
 of the notice], was, in presence of *L M* [design him], subscribing witness,
 given by me to *G H*, the tenant, by delivering such notice to him per-
 sonally [or by leaving such notice at his ordinary dwelling-house at
 , or by transmitting such notice to him through the post-
 office to his known address, as follows: (insert address to which notice
 sent)].

E F, Sheriff-officer.

L M, witness.

 SCHEDULE (K).

Letter of Removal.

[Place and date.]

SIR,—I am to remove from the farm of [insert name by which usually
 known,] at the term of eighteen hundred and

 16 & 17 Vict., c. 92.

as to the houses and grass, and at the separation of the crop from the ground as to the arable land [*or as the case may be*].

I am,

Your obedient servant,

[*Signed by the tenant.*]

[*Address.*]

Note.—If this letter is not holograph of the granter of it, it must be attested by one witness thus,—

L M, witness.

SCHEDULE (L).

Herefore it is my will, and I command you, that on sight hereof ye pass, and in Her Majesty's name and authority and mine lawfully summon, warn, and charge the said [*accused party*] to compear personally before me, or any of my substitutes, in a court to be holden by us, or any of us, at upon the day of in the hour of cause, at o'clock forenoon, for the first diet, there to plead guilty or not guilty, and to underlye the law for the crimes above mentioned; and also, if required, upon the day of , for the second diet, at o'clock forenoon, again to plead guilty or not guilty, and to underlye the law as aforesaid; as also, if required for the said second diet, alternately, that ye summon an assize hereto, being not fewer than the number of forty-five persons, together with such witnesses as best know the verity of the premises, whose names are hereto subjoined in a list subscribed by the complainer personally, or at their dwelling-places, all to compear before me or any of my substitutes, time and place of said second diet of compearance.

[*And so on to the end of the will now in common use.*]

16 & 17 Vict., c. 92.—An ACT to diminish the number of Sheriffs in *Scotland*, and to unite certain counties in *Scotland* in so far as regards the jurisdiction of the Sheriff.—
20th August 1853.

Whereas it is expedient that the number of Sheriffs in *Scotland* should be diminished, and that provision should be made for uniting certain counties in so far as regards the jurisdiction of the Sheriff: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal

Sheriff-court Act, 1858.

and Commons in this present Parliament, assembled, and by the authority of the same, as follows :

1. [*Counties specified in schedule to be united, and provision for discharge of the functions of Sheriff of the united counties.*].—Whenever a vacancy shall occur in the office of Sheriff of any counties or county specified in the schedule hereunto annexed, such counties or county, and the other counties or county named and included therewith in the said schedule, shall be united into one sheriffdom, under the title specified in the said schedule, and the functions of the Sheriff of the counties or county in which the vacancy shall occur shall thereupon devolve on and be discharged by the Sheriff of such other counties or county so included therewith ; and such Sheriff shall thereafter be, and be denominated, the Sheriff of the said united counties and sheriffdom, without the necessity of any new commission being issued in his favour, and shall have and exercise all the jurisdiction, powers, privileges, and authority competent to the Sheriffs of the said counties respectively.

2. [*County of Peebles to be united with County of Midlothian.*].—Whenever a vacancy shall occur in the office of Sheriff of the county of *Peebles*, the said county shall be united with the county of *Midlothian* into one sheriffdom, to be called the sheriffdom of *Midlothian* and *Peebles*, and the functions of the Sheriff of the said county of *Peebles* shall thereupon devolve on and be discharged by the Sheriff of *Midlothian*, who shall be, and shall be denominated, the Sheriff of *Midlothian* and *Peebles*, without the necessity of any new commission being issued in his favour, in like manner and to the like effect as is herein-before provided.

3. [*No separate appointments to be made to the office of Sheriff of counties to be united.*].—No separate appointment shall hereafter be made to the office of Sheriff of the said county of *Peebles*, or of any of the counties specified in the said schedule, but appointment shall only be made to the office of Sheriff of such united counties or sheriffdoms as vacancies shall occur after such union as aforesaid.

4. [*Saving rights, privileges, and liabilities of counties.*].—Provided always that, excepting as regards the person by whom the office of Sheriff shall be held and discharged, nothing herein contained shall affect or alter in any way the rights, privileges, or liabilities of the said counties respectively.

5. [*Sheriffs of united counties not to be entitled to additional salary.*].—Provided also that nothing herein contained shall give any right to the Sheriff of any such united counties to any additional salary

Lanarkshire Regulations.

beyond that enjoyed by him as Sheriff of any counties or county prior to any vacancy occurring as aforesaid.

SCHEDULE referred to in the foregoing Act.

Counties to be United.	Title of Sheriffdom.	Title of Sheriff.
1. The County of Sutherland and the County of Caithness.	Sutherland and Caithness.	The Sheriff of Sutherland and Caithness.
2. The County of Banff and the Counties of Elgin and Nairn.	Banff, Elgin, and Nairn.	The Sheriff of Banff, Elgin, and Nairn.
3. The County of Linlithgow and the Counties of Clackmannan and Kinross.	Linlithgow, Clackmannan, and Kinross.	The Sheriff of Linlithgow, Clackmannan, and Kinross.
4. The County of Dumbarton and the County of Bute.	Dumbarton and Bute.	The Sheriff of Dumbarton and Bute.
5. The County of Haddington and the County of Berwick.	Haddington and Berwick.	The Sheriff of Haddington and Berwick.
6. The County of Roxburgh and the County of Selkirk.	Roxburgh and Selkirk.	The Sheriff of Roxburgh and Selkirk.
7. The County of Wigton and the Stewartry of Kirkcudbright.	Wigton and Kirkcudbright.	The Sheriff of Wigton and Kirkcudbright.

REGULATIONS OF COURT FOR THE SHERIFF-COURTS OF LANARKSHIRE.

The Sheriff hereby intimates and enacts the subjoined Regulations to come into effect from and after 1st October 1867:—

1. Ordinary courts will be held in Glasgow by the Sheriffs-substitute every Tuesday, Wednesday, Thursday, and Friday, at eleven o'clock a.m. during session; and at each ordinary court a separate roll will be called, before the commencement of the other business, of all cases brought under the "Debts Recovery (Scotland) Act, 1867," which will be proceeded with on said roll according to the provisions

of the Act. [The Debts Recovery Roll is now called every Monday.]

2. Courts will be held by the Sheriff every Monday at eleven o'clock a.m., and every Thursday at twelve o'clock noon, for hearing appeals from the Glasgow ordinary courts, and debates on bankruptcy; and every alternate Wednesday, at eleven o'clock, for hearing appeals from Hamilton; and every other alternate Wednesday, at eleven

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o'clock, for appeals from Lanark, and at one o'clock for appeals from Airdrie.

3. The professional costume of all members of the Faculty of Procurators of Glasgow, appearing at the bar of the Sheriffs' Civil or Criminal Courts, is a gown and white neckcloth; procurators from Hamilton, Airdrie, and Lanark, who may not be provided with gowns, will appear in white neckcloths.

4. When a procurator is engaged before the Sheriff, or in the criminal court, it shall be held a reasonable cause for asking a continuation of any case requiring his attendance in any other court.

5. All appeals against interlocutors by the Sheriffs-substitute must be noted under the interlocutor appealed against, on the principal interlocutor sheets, and the clerk of court will be prepared to give access to said sheets, at all office hours, to the procurator desiring to note such appeal.

6. The principal interlocutor is not to be dated until a copy of it has been extended on the copy interlocutor sheets, and certified by the clerk of court as correct, after which the date will be added to the copy, and the same date will be inserted in the Act Book.

7. When a summons is tabled, the pursuer's procurator shall lodge therewith principal and duplicate interlocutor sheets and process, and borrowing inventories; and it is strongly recommended that all productions founded on in a summons be lodged with the clerk two days, and in summary cases one day, before the calling, that the defender or his procurator may have an opportunity of seeing them.

8. All processes of small size shall be tied by the pursuer's procurator with broad red tape, and

as soon as they become bulky, with a strap; and the pursuer's procurator is also bound to see that the covers of all steps of process be renewed when torn or soiled.

9. All processes appearing on the roll of any court, must be returned to the clerk not later than four o'clock p.m. of the day preceding, after which the clerk is prohibited from receiving the process, and the party failing to comply with this order will be liable to an award of interim expenses.

10. After a diet of any kind, if the previous borrowing receipt has been cancelled, the process must remain with the clerk until borrowed up in the usual way; and agents are strictly prohibited from taking away any process without giving the necessary receipt to the clerk.

11. All productions must be put up in paper of the same size as the other pleadings, and when new productions are made in the course of a proof, and are not entered at the time in the process inventory, the process shall not be lent out until the clerk of court has seen them so entered, and has also entered them in the borrowing inventory.

12. When defences are stated in the short form by minute, on a separate sheet or sheets of paper, the same shall be forthwith stitched by the clerk of court to the summons and within its cover.

13. Processes enrolled for debate will be continued on the roll only once, or, on special cause shown, twice, after the first enrolment; and if neither party is prepared to debate at the continued diet, the case will be dropped from the roll; and if this occurs on the Sheriff's appeal roll, the appeal will be dismissed, except on special causes shown.

 Act of Grace.

14. Seeing that it is necessary for the better despatch of business, that as nearly as possible an equal number of cases should depend before each of the four Sheriffs-substitute in Glasgow, it shall be competent to them to remit, by interlocutor, processes at the first calling in their roll, to any less burdened roll, with the view of equalising their respective labour; but this without prejudice to an occasional representation being made by par-

ties mutually, that they are desirous, for special reasons, that the case should proceed before a particular Sheriff-substitute.

15. The clerk of court will give publicity to the above regulations, by affixing a copy on the walls of the Court at Glasgow, and by transmitting a copy, for the like purpose, to each of the Sheriff-clerks-depute at Hamilton, Airdrie, and Lanark.

(Signed)

HENRY GLASSFORD BELL,
Sheriff of Lanarkshire.

SHERIFF CHAMBERS, GLASGOW, 30th September 1867.

 PART II.

 ORDINARY COURT—SPECIAL ACTS.

CHAPTER I.—ACT OF GRACE, AND AMENDING ACTS.

1696, c. 32.—An ACT anent the Aliment of Poor Prisoners.

Our Sovereign Lord considering that generally the burghs of this kingdom, havers of prisoners, are troubled and overcharged with prisoners thrust into their prisons, who have nothing to maintain themselves, but must of necessity either starve or be a burden upon the burgh; doth, therefore, and for remeid thereof, with advice and consent of the Estates of Parliament, statute and ordain that where any person is made or shall be made prisoner for a civil debt or cause, and shall be found or become so poor as that he cannot aliment himself, then, and in that case, it shall be leisume to the magistrate of the burgh where the prison is to which the said prisoner is committed, upon the complaint of the said prisoner, and his making faith in their presence that he hath not wherewith to aliment himself, to intimate the same to the creditors, one or more, at whose instance the said prisoner was committed or is detained, and to require him or them either to provide and give security for an aliment to him, not under three shillings *per diem*, or else to consent to his liberation; which if the said creditors refuse or delay to do within the space of ten days

Act of Grace and Amending Acts.

thereafter, then it shall be leisume to the said magistrates to set the said poor indigent prisoner at liberty, without any hazard of being liable for the debt and cause of the imprisonment, or to any other censure whatsoever: Provided always that if any other creditor, at whose instance he is made or detained prisoner, give surety to aliment the said indigent debtor, he shall still be kept prisoner as before; as also, that prisoners for criminal causes be in the same state as formerly.

6 *Geo. IV.*, c. 62.—An ACT to amend an Act of the Scottish Parliament, relative to the Aliment of Poor Prisoners.
—22d June 1825.

[*Scotch Act, W. III.*].—“Whereas by an Act of the Parliament of *Scotland*, passed in the first Parliament of King *William* the Third, intituled *Act anent the aliment of poor prisoners*, it was enacted that where any person is made or shall be made prisoner for a civil debt or cause, and shall be found or become so poor as that he cannot aliment himself, then and in that case it shall be leisome to the magistrates of the burgh where the prison is to which the said prisoner is committed, upon the complaint of the said prisoner, and his making faith in their presence that he hath not wherewith to aliment himself, to intimate the same to the creditors, one or more, at whose instance the said person was committed or is detained, and to require him or them either to provide and give security for an aliment to him, not under three shillings *Scots*, or three pence sterling *per diem*, or else to consent to his liberation; and whereas much distress is often suffered by such poor prisoners, from the want of support between the time that they are committed to prison and the time when an aliment is awarded and paid to them, pursuant to the said recited Act:” Be it therefore enacted by the King’s most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons in Parliament assembled, and by the authority of the same:

[*Sum to be deposited with each prisoner for aliment.*].—That from and after the expiration of one month after the passing of this Act, it shall not be lawful for the gaoler or keeper of any prison to which a prisoner shall be brought to be confined for a civil debt, to receive such prisoner into his custody, or confine him in such prison, unless the sum of ten shillings sterling shall be deposited in his hands by the creditor, in-carcerator, or other person for behoof of such creditor, as a means of and security for the aliment of such prisoner in the manner herein directed.

2. [*Aliment paid out of sum deposited till exhausted.*].—And be it enacted, in the event of an aliment being awarded under the said recited Act, that the gaoler or other person in whose hands the said sum of ten shillings shall have been deposited, shall pay out of the same the aliment of the said prisoner, at the same rate at which aliment shall subsequently be allowed to such prisoner, from the time that he shall have been brought to the prison to the time when aliment shall have been so awarded to him pursuant to the said recited Act, and thereafter until the sum so deposited shall be exhausted.

3. [*If no title to aliment, sum deposited to be returned.*].—And be it enacted that where, on application by any such prisoner for the benefit of the said recited Act, it shall be found that he is not entitled to the same, then the whole of the said sum of ten shillings by this Act required to be deposited shall forthwith be returned to the creditor or person by whom the same shall have been deposited.

4. [*Where no application, deposit to be returned.*].—And be it enacted that where any such prisoner shall not apply for the benefit of the said recited Act before the expiry of thirty days from the day of his commitment, the said sum of ten shillings shall in like manner be returned to the creditor or person by whom the same shall have been deposited, at the expiry of the said thirty days.

5. [*Money not exhausted returned.*].—And be it enacted that where an aliment shall be awarded to any such prisoner pursuant to the said recited Act, but the said sum of ten shillings shall not be thereby exhausted in the manner herein directed at the time such prisoner shall be liberated, so much of the said sum of ten shillings as shall remain unexhausted shall be returned to the creditor or person by whom the same shall be deposited.

6. [*On liberation, sum remaining to be returned.*].—And be it enacted that where the creditor shall consent to the liberation of any such prisoner, without payment of any part of the debt for which he shall have been incarcerated, before such prisoner shall have had reasonable time to obtain the benefit of the said recited Act, the said sum of ten shillings shall be returned to the creditor or person by whom the same shall have been deposited, after deducting the amount of the aliment of such prisoner during his confinement, at the lowest rate at which aliment is usually modified by the magistrate of the burgh.

7. [*Prisoners claiming benefit of Act to execute disposition in favour of creditors.*].—And be it enacted that every prisoner who shall claim the benefit of the said recited Act shall be bound, when desired, to execute a disposition *omnium bonorum* in favour of the creditor at

 Act of Grace and Amending Acts.

whose instance he is incarcerated, for behoof of all his creditors, the expense of such disposition being always defrayed by the creditor demanding the same; and any such prisoner refusing to grant such disposition after being duly required in writing so to do, shall not be entitled to aliment during the time he shall persist in such refusal.

ACT of SEDERUNT relative to the Form of Process in Civil Causes in the Courts of the Royal Burghs, and of Burghs of Barony—Edinburgh, 12th November 1825.

PART II., Chap. IV.—*Applications for the benefit of the Act of Grace.*

In applications for the benefit of the Act 1696, c. 82, commonly called the Act of Grace, the creditor or his agent shall be allowed to be present when the debtor makes oath; and, where it can conveniently be done, notice may be appointed to be given to the creditor or his agent of the day and hour when the debtor is to depone; and the creditor or his agent shall, if present when the debtor makes oath, be allowed to put all pertinent interrogatories to the debtor regarding his ability to aliment

himself in prison. If, upon advising the petition with the oath, the petitioner shall be allowed the benefit of the Act, no reclaiming petition from the creditor shall be competent. But he shall be allowed, within fourteen days, to lodge an articulate and specific condescendence of the facts he avers and undertakes to prove as relevant, for authorising the Court to recal the aliment already awarded, but which in the meantime must be paid to the debtor, in terms of the late Act of Parliament.

7 & 8 Vict., c. 34.—An ACT to amend and continue until the first day of September One thousand eight hundred and sixty-one, and to the end of the then next Session of Parliament, the law with respect to Prisons and Prison Discipline in Scotland.—19th July 1844.*

18. [*Sheriffs may dispose of applications for aliment and liberation of civil prisoners.*—And be it declared and enacted that Sheriffs within their respective sheriffdoms shall have the like powers and jurisdictions as have been possessed by magistrates of royal burghs, within their respective burghs, with respect to applications and proceedings for aliment and for liberation of civil prisoners.

* Made perpetual in regard to the section quoted, by the Prisons Administration Act, 1860, [c. 105.] § 76.

Cessio Bonorum, 5 & 7 Will. IV., c. 56.

CHAPTER II.—*CESSIO BONORUM*.

6 & 7 Will. IV., c. 56—An ACT for regulating the Process of *Cessio bonorum* in the Court of Session, and for extending the Jurisdiction of Sheriffs in Scotland to such Cases.—13th August 1836.

Whereas it is expedient to regulate the process of *cessio bonorum* in the Court of Session in *Scotland*, and to extend the jurisdiction of the Sheriff to such processes; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same:

[*Sheriffs to have jurisdiction as to cessio bonorum and sheriff-clerks and officers to act therein.*].—That after the first day of *October*, One thousand eight hundred and sixty-six, every Sheriff within *Scotland* shall possess jurisdiction in processes of *cessio bonorum*, brought before him in manner hereinafter provided, as fully as in any other action presently by law competent before him, and the sheriff-clerk and messenger-at-arms, and all sheriff officers in the several sheriffdoms in *Scotland* shall have power to act in their respective offices in relation to such processes.

2. [*A debtor against whom a warrant to imprison is issued, or who is in prison, &c., may apply for decree of cessio.*].—And be it enacted that if a debtor has been or shall be charged to pay a civil debt, and a warrant to imprison him has been issued, or if he be liable to imprisonment under a decree of a Small Debt Court, or be in prison or imprisoned and afterwards liberated, in respect in these several cases of a civil debt, it shall be competent to such a debtor, on or after the said thirty-first day of *October*, to apply for interim protection, and for decree of *cessio bonorum*, in the manner hereinafter provided.

3. [*Debtor may present to the Sheriff of the county in which he lives a petition praying for decree of cessio.*].—And be it enacted that after the said first day of *October*, such debtor may present to the Sheriff of the county in which he has his ordinary domicile a petition, setting forth that he has been charged, and that a warrant to imprison has been issued against him, or that he is liable to imprisonment under a small debt decree, or that he is in prison, or has been imprisoned, and afterwards liberated, in respect of a civil debt; that he is unable to pay his debts, and is ready to surrender

Cessio Bonorum,

his estates for behoof of his creditors, and praying for interim protection against the execution of diligence, and for decree of *cessio bonorum*; in which petition he shall insert a list of all his creditors, specifying their names and designations and places of residence, so far as known to him; and with such petition he shall produce (as the case may be) the schedule of an expired charge, or a copy certified by the clerk of the Small Debt Court, of the warrant on which he is liable to imprisonment, or, if he be in prison or imprisoned and thereafter liberated, a certificate from the keeper of the prison of such imprisonment, and the date thereof, and of the liberation.

4. [*Proceedings upon such Petition.*].—And be it enacted that on such petition being presented, the Sheriff shall issue a warrant, appointing the debtor to publish a notice in the *Edinburgh Gazette*, intimating that such petition has been presented, and requiring all his creditors to appear in court on a certain day, being not less than thirty days from the date of the gazette notice, and within five days after the date of such notice, to send letters to all the creditors specified in the petition, containing a copy of the said notice (paying the postage thereof), or, in his option, to cite them in terms of law, and which the debtor shall do accordingly; and the Sheriff shall farther ordain him to appear on the day so appointed for the compareance of the creditors, in presence of the Sheriff or his substitute, for public examination; and the debtor shall, on or before the sixth lawful day prior to the day so appointed, lodge, to be patent to all concerned, a state of his affairs subscribed by himself, and all his books, papers, and documents relating to his affairs in the hands of the sheriff-clerk, together with a copy of the said gazette, and if the letters have been sent through the post office, a certificate subscribed by his agent, or by a messenger or sheriff-officer, and a witness, stating the date and the place where the letters were put into the post office, that the postage was paid, and that they were severally addressed as specified in the petition, or an execution subscribed by a messenger or sheriff-officer, and one witness, of citation of the creditors to whom such letters have not been so sent.

5. [*Debtor to undergo examination before Sheriff.*].—And be it enacted that on the said day appointed for the compareance of the creditors, the debtor shall appear in public court, in presence of the Sheriff, for examination as to his affairs, and the Sheriff shall have power to put him on oath or affirmation (as the case may be), and the debtor shall be bound to answer all pertinent questions put to him by the Sheriff, or by any creditor, with the approbation of the

Sheriff, under certification that if, without lawful cause, he refuses to be put on oath or affirmation, or to answer any such question or to subscribe his examination, decree of *cessio* shall be refused *in hoc statu*; and it shall be competent to the Sheriff to adjourn the examination for such time as to him shall appear fit and reasonable.

6. [*Sheriff, after examination, to decide in cases originating before him.*].—And be it enacted that the Sheriff shall, on such examination being taken, allow a proof to the parties if it shall appear necessary, and hear parties *viva voce*, and shall make a note of any objections that may be stated on the part of the creditors, and either grant decree, or refuse the same *in hoc statu*, or grant it, subject to a declaration that it shall not be extractable or available as a protection to the debtor for such time as shall appear proper, or make such other orders as may be necessary for the due administration of justice; provided that where the Sheriff shall grant decree under such limitation, or refuse decree *in hoc statu*, he shall state the grounds of his decision, and the most summary dispatch consistent with the forms of court shall be given, and the Sheriff's note of the objections shall form part of the process.

7. [*Reclaiming petition.*].—And be it enacted that if such decree be pronounced by the Sheriff-substitute, it shall be competent to any person aggrieved to present a reclaiming petition against the same, provided that the petition be lodged within six days from the date of the judgment, and the Sheriff-substitute shall do therewith as shall be just; and in case the complainer shall intimate his desire in the petition that if the Sheriff-substitute be disposed to refuse the petition it may be laid before the Sheriff, it shall be transmitted to the Sheriff, who shall do therein as shall be just.

8. [*Review of Sheriff's judgments by Court of Session.*].—And be it enacted that it shall be lawful, either after such reclaiming petition has been disposed of, or without presenting such petition, for any person aggrieved to bring the judgments under the review of the Court of Session by lodging with any one of the clerks of that division of the court under whose review he wishes to bring the cause a reclaiming note, having such division marked thereon, reciting the judgment or judgments complained of: Provided always that the said note shall be lodged within ten days from the date of the judgment, or the last of the judgments complained of, unless the judgment be pronounced by the Sheriff of *Orkney*, in which case the reclaiming note shall be lodged within twenty days from the date of the judgment, or the last of the judgments, as aforesaid; and a copy of the said note shall in all

Cessio Bonorum,

cases be delivered within the said respective periods to the respondent or his known agent, which shall be held to be due service, and a copy thereof, certified by the said clerk of session, shall be a sufficient warrant to the sheriff-clerk to transmit to the said clerk the proceedings in the process.

9. [*Reclaiming note to be enrolled, and court to pronounce judgment, &c.*].—And be it enacted that if the Court of Session be sitting, the reclaiming note shall be enrolled as soon as conveniently can be, and the Court shall pronounce judgment, or remit the cause to the Sheriff with such instructions as to them shall seem fit, or to the Lord Ordinary on the Bills during vacation, or during the *Christmas* recess.

10. [*Lord Ordinary on Bills may judge during vacation or Christmas recess, subject to review.*].—And be it enacted that if the Court of Session be not sitting when the reclaiming note has been lodged, the cause shall, as soon as thereafter may be convenient, be transmitted to the Bill-Chamber clerk, and be enrolled in a roll to be kept for that purpose in the Bill-Chamber; and the Lord Ordinary on the Bills shall, on a day to be specified in that roll, hear parties *viva voce*, and pronounce judgment, as herein before provided; and for the purposes of this Act he shall possess, during the vacation and the *Christmas* recess, the powers competent to the Inner-House during session, but his judgment shall be subject to review in manner hereinafter mentioned; and if the proceedings have not been brought to a termination before the Lord Ordinary on the Bills at the commencement of the ensuing Session, the cause shall be re-transmitted and enrolled before the Inner-House, which may give judgment therein as if it had been enrolled, or had continued without interruption before the Inner-House.

11. [*Proceedings in cases originating in the Court of Session.*].—And be it enacted that where a summons of *cessio bonorum* is raised before the Court of Session, the debtor shall publish a notice in the *Edinburgh Gazette*, intimating that the said summons has been raised, specifying in which division of the Court it is to be enrolled, and requiring all his creditors to appear within thirty days from the date of the said gazette notice; and he shall also send letters through the post office (paying the postage thereof) to each of the creditors specified in the summons, to the same effect, or, in his option, cite them in terms of law; and, on or before the sixth lawful day prior to the expiration of the said thirty days, he shall lodge, to be patent to all concerned, a state of his affairs subscribed by himself, and all his books, papers, and documents relating to his affairs, in the hands

6 & 7 Will. IV., c. 56.

of the clerk to the process, together with a copy of the said gazette; and, if the letters have been sent through the post office, he shall produce a certificate subscribed by his agent, or by a messenger or sheriff-officer and a witness, stating the date and the place where the letters were put into the post office, that the postage was paid, and that they were severally addressed as specified in the summons, or an execution subscribed by a messenger and one witness of citation of the creditors to whom such letters have not been so sent.

12. [*Court of Session may remit to the Sheriff, who shall take proceedings thereupon, and report.*].—And be it enacted that on expiration of the said thirty days the process shall forthwith be enrolled in the rolls of the division of the Inner-House specified in the said notice, without the necessity of being called or enrolled in the Outer-House, and it shall be competent to the Inner-House to remit to the Sheriff of the county in which the debtor's domicile is, to take his examination in presence of his creditors, and for that purpose, on a day appointed, the debtor shall appear in presence of the Sheriff, who shall have power to put him on oath or affirmation (as the case may be), and the debtor shall be bound to answer all pertinent questions put to him, under certification that if without lawful cause he refuse to be put on oath or affirmation, or to answer any such question, or to subscribe his examination, decree of *cessio* shall be refused *in hoc statu*; and the Sheriff shall thereupon report to the said Inner-House, who may either grant decree or refuse the same *in hoc statu*, or grant it subject to a declaration that it shall not be extractable or available as a protection to the debtor for such time as shall appear proper, or issue such other orders as may be necessary for the due administration of justice.

13. [*Lord Ordinary on the Bills may judge on the report during vacation or Christmas recess.*].—And be it enacted that if the Court of Session be not sitting at the time when the said report has been made by the Sheriff, the cause may be enrolled in a roll to be kept for that purpose in the Bill Chamber, and the Lord Ordinary on the Bills shall, on a day to be specified in that roll, hear parties *viva voce*, and pronounce judgment; and if the Court of Session be sitting when the report of the said examination is made, but the proceedings cannot be brought to a termination before the expiration of the session, or before the commencement of the *Christmas* recess, the Inner-House may remit the cause to the said Lord Ordinary to proceed therein during vacation or the *Christmas* recess, in the same way as if the cause had been enrolled in the Bill Chamber in manner above provided;

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and if the proceedings have in any case not been brought to a termination before the Lord Ordinary on the Bills at the commencement of the ensuing Session, the cause shall be enrolled before the Inner-House, which may give judgment therein as if it had been enrolled, or had continued without interruption before the Inner-House; and for the purposes of this Act the Lord Ordinary on the Bills shall possess, during the vacation and the *Christmas* recess, the powers competent to the Inner-House during Session; but his judgment shall be subject to review in manner hereinafter mentioned.

14. [*Judgment of the Lord Ordinary on the Bills subject to review.*].—And be it enacted that it shall be competent for any person aggrieved by any judgment pronounced by the Lord Ordinary on the Bills to bring the same under the review of the Inner-House by a reclaiming note, provided the note be lodged within ten days after the date of the judgment, and duly intimated to the agent of the respondent, and the Inner-House shall proceed with all despatch to hear parties *viva voce* thereon, and may give judgment as aforesaid, or issue such other orders as may be necessary for the purposes of justice.

15. [*Power to grant interim protection or liberation.*].—And be it enacted that if the debtor be in prison, it shall be competent for the Inner-House during Session, and for the Lord Ordinary on the Bills during the vacation or the *Christmas* recess, whether the case has been originally instituted in the Court of Session or before the Sheriff (provided that it be under review of the said Court), and for the Sheriff, where the petition has been presented to and is depending before him, on production of a copy of the said gazette containing the notice aforesaid, and of the certificate of transmission of the letters or execution of citation, to grant warrant to liberate the debtor; and, if the debtor is not in prison, to grant warrant for his personal protection against the execution of diligence for such space of time as shall be proper; provided that, before any such warrant be issued, the debtor shall lodge with the clerk of court a bond with a sufficient cautioner, binding themselves that he shall attend all diets of court whenever required, under such penalty as may be reasonable, and which, if forfeited, shall be divided among the creditors; and it shall be competent for the Inner-House, or the said Lord Ordinary, or the Sheriff respectively, in all cases to grant warrant to bring the debtor before them for examination, and also to carry him back to prison; and such warrant, as well as the warrant of liberation and the warrant of personal protection, shall be good and lawful warrants in all

parts of *Scotland* to the effect therein specified; and it shall not be competent, where the warrant of liberation or protection is granted by the Lord Ordinary on the Bills, or the Sheriff, to suspend the effect thereof by lodging a reclaiming note or petition complaining of the same: Provided nevertheless that a reclaiming note or petition may be lodged as hereinbefore provided, and it shall be competent to the Inner-House, or the Sheriff (as the case may be), on hearing parties, to recall the warrant of liberation and protection.

16. [*Decree to operate as an assignation to creditors, or disposition omnium bonorum to be granted.*].—And be it enacted that the decree pronounced by the Inner-House, or by the Lord Ordinary on the Bills, or by the Sheriff, granting the benefit of *cessio bonorum*, shall operate as an assignation of the debtor's moveables in favour of any trustee mentioned in the decree for behoof of the creditors: Provided always that it shall be optional to the creditors to require the debtor to execute a disposition *omnium bonorum*, as has been hitherto granted in processes of *cessio* before the Court of Session, in favour of the trustee, the expense of which deed shall be paid out of the readiest of the funds thereby conveyed.

17. [*Provision where decree refused in hoc statu.*].—And be it enacted that if the decree of *cessio* be refused *in hoc statu*, either by the Court of Session or the Sheriff, the debtor may at any time thereafter, without the necessity of raising any new summons or presenting any new petition, apply to have decree of *cessio* pronounced in his favour; and if the decree has, on review by the Court of Session, been refused *in hoc statu*, the debtor may either apply to that Court for decree, or present a new petition to the Sheriff, in which latter case proceedings shall take place as if no former petition had been presented, and the debtor shall, in all cases of a renewed application, give notice thereof in such manner as shall be appointed either by the Court of Session or Sheriff respectively.

18. [*Dyvours habit abolished. Oath to be taken, and insolvency proved if denied. Act of 1696, c. 5, in part repealed.*].—And be it enacted that it shall not be lawful to ordain the debtor to wear the dyvours habit; and he shall be required to prove his insolvency (if the same shall be denied) as by law presently established; and he shall be bound to make oath or affirmation in cases before the Sheriff as well as in those before the Court of Session, in the same terms as the oath hitherto administered in processes of *cessio* in the Court of Session; and an Act of the Parliament of *Scotland*, passed in the year sixteen hundred and ninety-six, intituled *An Act for declaring notour*

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bankrupts, shall be and is hereby repealed, in so far as the said Acts bear that "the Lords of Session are hereby discharged to dispense any bankrupt as to the habit, unless in the summons and process of *cessio* the bankrupt's failing through misfortune be libelled, sustained, and proven."

19. [*Regulation of appeals to the House of Lords.*].—And be it enacted that nothing herein contained shall exclude an appeal to the House of Lords against the judgment of the said Inner-House either granting or refusing decree of *cessio*: Provided always that the petition of appeal be lodged within ten days from the date of the judgment, during the sitting of Parliament, if it shall continue to sit for so many days, and if Parliament be not sitting, or, if sitting, there be not so many days, then the petition of appeal shall be presented within six days after the next Session of Parliament shall have met.

20. [*No fee-fund dues or Government duties exigible.*].—And be it enacted that no fee-fund dues shall be exigible in respect of any of the proceedings mentioned in this Act, nor shall any stamp-duty or other Government duty, be exigible in respect of any notices or advertisements authorised by this Act to be inserted in the *Edinburgh Gazette*, nor in respect of any disposition which the debtor shall be ordained to execute in terms of this Act; any law or statute to the contrary notwithstanding.

21. [*Court of Session agents may practice in Sheriff-courts.*].—And be it enacted that it shall be lawful for all agents duly qualified to practice before the Court of Session to practice as agents in all Sheriff-courts, in so far as relates to any of the proceedings which are authorised by this Act to be carried on before the Sheriff; provided that they shall not be entitled to payment of any other or higher fees than those legally exigible by other agents before such courts.

22. [*Act may be repealed this Session.*].—And be it enacted that this Act may be repealed, altered, or amended by any Act or Acts passed during the present Session of Parliament.

ACT of SEDERUNT regulating Processes of *Cessio Bonorum* in Sheriff-courts, raised under the Statute 6th and 7th Will. IV., c. 56.—Edinburgh, 6th June 1839.

The Lords of Council and Session having considered a report from the Sheriffs of Scotland respecting the expediency of regulating the procedure in processes of *cessio bonorum* in Sheriff-courts, so as to render the

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same as nearly uniform as possible in all the Sheriff-courts, and consistent with the enactments of the late Act, 6th and 7th Will. IV., c. 56, do hereby enact and declare as follows :—

1. All petitions for the benefit of *cessio bonorum* presented to the Sheriff shall be framed in terms of 6th and 7th Will. IV., c. 56, § 3, and shall be in the form of schedule (A) hereto annexed, or as near thereto as the circumstances permit.

2. When intimation is made to the creditors by letter, in terms of § 4 of the statute, the transmission of a copy of the notice in the gazette required by the statute, addressed to each creditor shall be held a sufficient implement of the said enactment, but the name of the petitioner's agent shall always appear in or be annexed to the said notice.

3. When the debtor avails himself of the option given by § 4 to cite any of the creditors in terms of law, the citation shall be given not later than ten days next after the publication in the gazette; and the creditors shall be cited to a diet of compareance at least thirty days subsequent to the date of publication in the gazette.

4. When the petition for *cessio* prays also for interim protection from diligence or liberation, that prayer shall be specially intimated by the notice in the gazette; and by the letters (if any) sent to the creditors.

5. The certificate of the letters having been duly transmitted, shall in all cases contain the particular address of each letter as sent.

6. In processes of *cessio*, whether the creditors or any of them shall have been called by letters or cited in terms of law, the cause shall not be enrolled, nor shall any procedure take place therein, either as to the *cessio*, or any application for

interim protection or liberation, or otherwise, until the diet of compareance in the cause; without prejudice to the debtor lodging in the hands of the clerk of court the documents specified in § 4 of the statute, on or before the sixth day prior to the day of compareance.

7. If the debtor fail to lodge in the hands of the Sheriff-clerk the state, books, and other documents, required by § 4 of the statute, by the time therein specified, the process shall be dismissed by the Sheriff, unless he shall be satisfied that the debtor had sufficient excuse; in which case the Sheriff may order new intimation to the creditors, or make such order as he may think necessary.

8. When it is objected that all the creditors have not been called, the objector shall, at the time of stating his objection, give in a list, signed by himself or his agent, specifying the names and designations, so far as known, of the creditors alleged to be omitted; and the Sheriff shall have power to dispose of the objection as he may see cause; and, in particular, he may either dismiss the process, or give authority by a special interlocutor (which interlocutor shall not be subject to review by appeal or otherwise), to call the persons named in the said list, by citation on the petition, to compare within six days after citation, if within Scotland, or otherwise to call the said creditors, whither in Scotland or furth thereof, by letter (post paid), to compare within fifteen days after the despatch of the letter; and if it shall appear that those persons, or any of them, were not creditors, the objector shall be

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found liable in the expenses unnecessarily occasioned by his objection.

9. When creditors not originally called, but afterwards cited under authority of the Sheriff, as already provided in § 8 of this Act of Sederunt, shall appear in the process, it shall be competent for the Sheriff, on the application of such creditors, in case the original diet for the creditor's examination has elapsed before such appearance, to fix another diet for his re-examination; of which diet it shall be incumbent on the debtor to give notice to each of the original creditors, or his known agent, by letter, post paid.

10. When the process has been raised by a bankrupt under sequestration, and not discharged, it shall be necessary to produce a certificate under the hands of a trustee or of a majority of the commissioners, stating whether the bankrupt had attended the diets fixed for his examination, and setting forth how far he has, in their opinion, or to the best of their knowledge and belief, make a full and fair surrender of his means and estate, and has in other respects duly complied with the requisites of the Bankrupt Act; reserving the effect of such certificate to be considered by the Sheriff; and further, reserving power to him to require a special report from the trustee or commissioners, or to order them to attend for examination on oath or otherwise. The trustee, or a majority of the commissioners, shall be bound, within eight days after requisition by the bankrupt, to grant such certificate, or, failing thereof, it shall be competent to proceed in the cause as if the same had been granted.

11. When the debtor shall,

either in his original petition, or afterwards by incidental petition, apply for interim protection from diligence, or for liberation from prison, he shall set forth the amount of caution, and the name of the cautioner or cautioners offered by him; and a copy of the petition, when presented separately, shall be served on the agent or agents for the opposing creditors, forty-eight hours at least before being moved in court; and the Sheriff shall thereafter, on hearing parties, do therein as may seem just; the debtor always finding caution to the satisfaction of the clerk, to such amount as may be fixed by the Sheriff, before interim protection or liberation shall be granted. The bond of caution shall be according to one or other of the forms contained in schedule (B) annexed.

12. When the debtor shall have been put on oath at his first examination, under § 5 of the statute, the creditors shall not be thereby precluded from afterwards proving their case, in opposition to the *cessio*, by witnesses or other competent evidence.

13. When a proof is allowed, it is recommended that the Sheriff shall, by the interlocutor allowing it, specify, if possible, under articulate heads, the several facts to be proved by either party.

14. The Sheriff shall, in all cases, either make notes of the evidence, which notes shall form part of the process; or he may, by an interlocutor, which shall not be subject to review by appeal or otherwise, appoint the proof, or any part thereof, to be taken down *verbatim* by the clerk, which shall be subscribed by the witness or witnesses, and by the Sheriff or commissioner, when a commission is necessary.

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15. When the Sheriff shall make a note of objections under § 6 of the statute, he shall also make a note of the answers thereto. These notes shall, before being lodged in process, be signed by the Sheriff.

16. It shall be competent for the Sheriff to hear parties *viva voce*, both at the time of the debtor's examination (whether on declaration or oath) and on the proof, and at such other times as may appear to him to be necessary; and in either case he shall make a note of objections and answers, as before provided.

17. It shall be competent for the Sheriff to allow answers to reclaiming petitions lodged under § 7 of the statute.

18. No appearance for an opposing creditor shall be allowed without production of the letter sent to him, the citation served, or a mandate subscribed by him.

19. It being provided by § 18 of the statute that debtors, on obtaining decrees of *cessio*, "shall make oath in the same terms as hitherto administered;" it is declared that when debtors take and subscribe an oath or affirmation in the form contained in schedule (C) hereto annexed, they shall be held to have sufficiently complied with the provisions of the statute.

20. It shall be competent for the Sheriff to ordain the debtor, whether under protection or not, to attend at any diet of court, and particularly at any diet at which an interlocutor granting or refusing the *cessio* may be pronounced, intimation of such order being always made to the cautioners of the debtor.

21. When any interlocutor is pronounced, refusing the *cessio* or granting it, subject to a declaration that it shall not be extractable or available as a protection to the

debtor for a certain time, any unexpired liberation or personal protection granted to the debtor under the statute shall be held as *ipso facto* recalled, without prejudice to the debtor again petitioning the Sheriff for protection or liberation while the case remains in the Sheriff-court.

22. It being provided by § 17 of the statute that when the decree of *cessio* has been refused *in hoc statu* it shall be competent to the debtor at any time thereafter to make a renewed application for the benefit of the *cessio*, and that the "debtor shall, in all cases of a renewed application, give notice thereof in such manner as shall be appointed either by the Court of Session or Sheriff respectively;" it is enacted that it shall be competent for the debtor to make the renewed application by a minute, without argument, annexed to his original petition; and that he shall give notice thereof to all his creditors, by letters addressed to each through the post office, paying the postage thereof; and the case shall not be taken up till twenty days after the despatch of all the said letters, the fact of the despatch being established by certificates satisfactory to the Sheriff.

23. When it shall appear that any of the provisions of the statute, or of this Act of Sederunt have been omitted or not duly complied with by the pursuer of any process of *cessio*, the process may be sisted till the regulations have been duly complied with in all points, if it shall appear to the Sheriff, from the nature of the omission, that this can be still done consistently with justice, and with the due execution of the statute.

C. HORE, I.P.D.

*Cessio Bonorum.*FORMS.
SCHEDULE (A).*Form of Petition.*

Unto the Honourable the Sheriff of the county of
the Petition of [*giving the full name and designation, and present
place of residence, and specifying the jail, if the debtor has been or
is incarcerated*];

Humbly Sheweth,

That the petitioner has been charged, and that a warrant to
imprison has been issued against him at the instance of
, for not making payment of the sum of £
contained in a

[*Or*] That he is liable to imprisonment under a small debt decret,
obtained against him at the instance of
for the sum of £

[*Or*] That he is in prison in respect of a civil debt amounting to
£ at the instance of

[*Or*] That he has been imprisoned, and afterwards liberated in re-
spect of a civil debt, amounting to £
at the instance of [*specifying the debt, and the particular
circumstances of its constitution, by bill, decret or otherwise*].

That the petitioner is unable to pay his debts, and is ready to sur-
render his whole means and estate for behoof of his creditors. That his
inability to pay his debts has not been occasioned by fraud, but has
arisen solely from misfortunes and losses, to be particularly specified in
the state of his affairs, subscribed by himself, and to be produced in the
hands of the clerk of court. That the following is a list of the peti-
tioner's real or pretended creditors, viz.—[*stating their names on separate
lines, with a progressive number for the sake of reference*].

That there is herewith produced the schedule of an expired charge
for payment of the said debt. [*Or*] A copy, certified by the clerk of the
Small Debt Court, of the warrant in which he is liable to imprisonment.
[*Or*] A certificate from the keeper of the prison of the imprisonment of
the petitioner, and the date thereof, and of the liberation [*if such there
were*].

That the petitioner is farther desirous to obtain a warrant of [*libera-
tion and*] interim protection against the execution of diligence, and is
ready to find sufficient caution acted in the Sheriff-court books of the
county of to the amount of
for which will become his cautioner.

May it therefore please your Lordship to grant warrant for the re-
quisite intimation or citation, and, on the expiry of the *inducia*,
and on the petitioner finding such caution, to grant authority
for his liberation and interim protection against the execution
of diligence; thereafter, on resuming consideration of this peti-
tion, and advising the whole cause, to find that the petitioner is

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entitled to the benefit of the process of *cessio bonorum*, and to grant decret accordingly, and to appoint such person as your Lordship shall think proper, trustee, who shall take the management and disposal of his estate for the general behoof of his creditors; all in terms of the Statute, and Act of Sederunt made thereanent.

According to justice, &c.

SCHEDULE (B).

Form of Bond of Caution.

I, *A B*, do hereby in terms of the 15th section of the Statute 6 & 7 Will. IV., chap. 56, and of an interlocutor of the Sheriff of _____, dated _____, pronounced "in the petition for the benefit of the process of *cessio bonorum* presented to him in name of *C D*."

[*Or*] "In the petition of *C D*, in the process of *cessio bonorum* at his instance against* his creditors,"—judicially enact, bind, and oblige myself, my heirs, executors, and successors, as cautioner and surety for the said *C D*, that he the said *C D* shall attend all diets of Court, whenever required, under the penalty of £ _____, and which, if forfeited, shall be divided among the creditors; and that diligence shall pass hereon for the same at the instance of the clerk of Court; and I the said

hereby specially agree that (*here insert the "sheriff-clerk's office," or some other place within the county*) shall be held as my domicile, to the effect of leaving there for me all citations or other intimations in this cause, or that a letter with such citations or intimations, addressed

and sent through the post office, shall be equal to a personal citation. In witness whereof, &c.

[*Or, if the parties prefer it, they can find caution in the usual terms of judicial caution acted in the books of Court, thus—*]

At _____ the _____ day of _____, One thousand eight hundred and _____

Appears *A B*,

and in terms of the 15th section of the statute 6 & 7 Will. IV., chap. 56, and of an interlocutor of the Sheriff of _____ of _____ dated _____, pronounced "in the petition for the benefit of the process of *cessio bonorum* presented to him in name of *C D*."

[*Or*] "In the petition of *C D*, in the process of *cessio bonorum* at his instance against* his creditors,"—hereby judicially enacts, binds, and obliges himself, his heirs, executors, and successors, as cautioner and surety, acted in the Sheriff-court books of _____, for the said *C D*, that the said *C D* shall attend all diets of Court, whenever required, under the penalty of £ _____, and which, if forfeited, shall be divided among the creditors; and that diligence shall pass hereon at the instance of the clerk of Court; and the said _____ hereby specially agrees that

* This where a separate petition is given in under the 15th section.

Cessio Bonorum,

(here insert the "sheriff-clerk's office," or some other place within the county) shall be held as his domicile, to the effect of leaving there for him all citations or other intimations in this cause, or that a letter with such citations or intimations, addressed _____, and sent through the post-office, shall be equal to a personal citation.

[If more cautioners than one bind themselves severally, or jointly and severally, the form will be varied accordingly.]

(SCHEDULE (C).

Form of Oath.

At _____ the _____ day of _____ in presence of _____ Compeared *A B*, who being solemnly sworn and examined, depones, That the state produced in process is a true and correct state of his affairs to the best of the deponent's knowledge and belief. Depones, That he has no lands, heritages, debts, sums of money, goods, or gear belonging to him, other than what are specified in the said state, and in the disposition executed by him in this process (if one shall have been required by the creditors). Depones, That he has made no disposition or other conveyance of his effects, or any part thereof, other than explained in the state of his affairs. Depones, That he has not put out of his hands any money, goods, or gear, belonging to him : nor has he, to the prejudice of his creditors, cancelled, concealed, or away put any writs or documents. All which he depones to be truth, as he shall answer to God.

C. HOPE, *I.P.D.*

Edinburgh, 6th June 1839.

CHAP. III.—RELIEF OF THE POOR.

8 & 9 Vict., c. 83.—An ACT for the Amendment and better Administration of the Laws relating to the Relief of the Poor in Scotland.—4th August 1845.

73. [Party refused [relief] may apply to Sheriff]—And be it enacted that if relief shall be refused to any poor person who shall have made application for relief, it shall and may be lawful for such poor person to apply to the Sheriff of the county in which the parish or combination from which such poor person has claimed relief, or any portion of such parish or combination, is situate, and the said Sheriff shall forthwith, if he be of opinion that such poor person is, upon the facts stated, legally entitled to relief, make an order upon the inspector of the poor, or other officer of such parish or combination, directing him to afford relief to such poor person in the meantime, until such inspector or

8 & 9 Vict., c. 88.

other officer shall, on or before a day to be appointed by the said Sheriff, and to be intimated in the same order, give in a statement in writing showing the reasons why the application of such poor person for relief was refused, which statement the said Sheriff shall afterwards appoint to be answered, and shall, if required, nominate an agent to appear and answer on behalf of such poor person, and shall farther, if necessary, direct a record to be made up, and a proof to be led by both parties; and it shall be lawful for the Sheriff, if he shall see fit, to direct the interim support to such poor person to be continued until a final judgment shall have been pronounced on the merits of the case: Provided always that nothing herein contained shall be construed to enable the said Sheriff to determine on the adequacy of the relief which may be afforded, or to interfere in respect of the amount of relief to be given in any individual case.

ACT of SEDERUNT for Regulating Procedure before the
Sheriff-courts, in applications under the Statute 8 & 9
Vict., c. 83, § 73.—Edinburgh, 12th February 1846.

Whereas it is proper that proceedings before the Sheriffs under the statute 8 & 9 Vict., c. 83, intituled "An Act for the Amendment of the Laws relating to the Relief of the Poor in *Scotland*," should be summary and uniform,—

The Lords of Council and Session do hereby enact and declare—

1. That where relief has been refused, by any parish or combination, to any poor person who shall have made application for relief, such poor person may apply to the Sheriff of the county without the intervention of an agent, and either verbally or in writing.

2. That the Sheriff shall forthwith proceed to consider the facts stated by such poor person; and if he be of opinion, upon the facts so stated, that such poor person is not legally entitled to relief, he shall at once pronounce a deliverance to that effect.

3. That if, on the contrary, the said Sheriff shall be of opinion, upon the facts so stated, that such poor person is legally entitled to relief,

then he shall forthwith make an order upon the inspector of the poor, or other officer of the parish or combination, directing him to afford relief to such poor person in the meantime, until such inspector or other officer shall, on or before a day to be appointed by the Sheriff in the same order, and to be intimated, lodge with the sheriff-clerk a statement, in writing, shewing the reasons why the application of such poor person for relief was refused.

4. That it shall be sufficient intimation of such order to the said inspector or other officer, that a certified copy thereof be transmitted to him through the post-office marked on the back with the words

Relief of the Poor.

"Sheriff's-Office—Poor-Law Intimation — Immediate." And it shall be the duty of the sheriff-clerk to make such intimation. And the sheriff-clerk shall preserve the principal order by the Sheriff, and likewise enter in the minute-book of court the date of transmitting the copy thereof as aforesaid.

5. That if, after such intimation, the inspector or other said officer, shall not, within the time appointed by the Sheriff, lodge a statement in writing, in terms of the Sheriff's order, the Sheriff shall forthwith, upon a certificate by the sheriff-clerk that a copy of such order was duly transmitted as aforesaid, pronounce a deliverance or judgment, definitively finding such poor person to be legally entitled to relief, and ordaining the parish or combination instantly to proceed and determine the question of amount.

6. That where, on the other hand, the inspector or other said officer, shall duly lodge his statement in writing, in terms of the Sheriff's order, the Sheriff shall appoint the same to be answered; and he shall, if required, nominate an agent to appear and answer on behalf of such poor person; and shall further, if necessary, direct a record to be made up, and a proof to be led, by both parties; after which he shall proceed to pronounce judgment in the cause, finding substantively such poor person to be legally either *entitled* or *not entitled* to relief; and, in the former case, ordaining the parish or combination, as before, instantly to proceed and determine the question of amount.

7. That so long as the cause shall be in dependance before the Sheriff, and after the said inspector or other officer shall have given in

his statement in writing as aforesaid, it shall be lawful for the Sheriff to resume at any time the question of interim support; and (if he shall see fit) to direct such interim support to be continued until a final judgment shall have been pronounced on the merits of the case; And it shall, on the other hand, be lawful for the Sheriff (if he see fit), after the said inspector or other officer shall have given in his statement in writing to direct such interim support to be at any time discontinued,—as well as thereafter at any time to ordain the same to be of new afforded, as he may see cause.

8. Finally, that the said causes, so far as such poor person applying to the Sheriff is concerned, shall, in all respects, be conducted on the same footing,—in regard to payment, in the first instance, of any dues of court, or other fees,—as if such poor person had been admitted to the benefit of the poor's roll; that is to say, such poor person shall not, in the first instance, be liable in payment either of any dues of court, or of any dues to the clerk or officers of court, or of fees to any agent who may have been appointed to act in his behalf as aforesaid, except to the extent of actual outlay; but in the event of such poor person being ultimately found entitled to expenses of process, it shall be competent to such poor person to include and charge in his account of said expenses, as against the parish or combination, all ordinary fees of court, including clerk's dues and dues of extract, as well as fees, at the usual rate of charge, to his agent, and any officers of court, in like manner as if he had been an ordinary litigant; and, on the said expenses being recovered, the amount thereof shall be accounted for by such

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poor person, or his agent, to the several parties interested. And further, in the event of such poor persons being ultimately subjected by the Sheriff's judgment in expenses to the parish or combina-

tion, the expenses so awarded shall be held to include all the usual fees and dues payable, and which have been paid, by the said parish or combination in the character of an ordinary litigant.

And the Lords appoint this Act to be inserted in the Books of Sederunt, and to be printed and published in common form.

D. BOYLE, *I.P.D.*

CHAP. IV.—ENTAIL AMENDMENT ACT 1868.

31 & 32 *Vict.*, c. 84.—An ACT to amend in several particulars the Law of Entail in Scotland.—31st July 1868.

1. [*Short title.*].—This Act may be cited for all purposes as the "Entail Amendment (*Scotland*) Act 1868."

2. [*Interpretation of terms.*].—The following words occurring in this Act shall, except where the nature of the provision shall be repugnant to such construction, be construed as follows; that is to say, the words "Court of Session," or "the Court," shall be construed to mean either Division of the Court of Session, or the Junior Lord Ordinary, or the Lord Ordinary on the Bills, as the case may be; the word "Sheriff" shall include "Sheriff-substitute;" the words "heir of entail" shall include "institute;" the word "lands" shall extend to and comprehend all heritages; the words "entailed estate" shall extend to and comprehend all heritages which by the law of *Scotland* may be made the subject of entail; and the words "feu-charter" shall comprehend a feu-contract, a feu-disposition, and every other grant of a like kind.

3. [*Power to grant feus, building leases, &c.*].—It shall be lawful for any heir in possession of an entailed estate, notwithstanding any prohibitions or limitations in the deed of entail or in any Act of Parliament, in the manner and subject to the conditions hereinafter mentioned, to grant leases for the purpose of building for any number of years not exceeding ninety-nine years, or feus of any part of such estate (but reserving the minerals therein and the right of working the same), except the garden, orchards, policies, or inclosures adjacent to or in connection with the manor place, in so far as such garden, orchards, policies, or inclosures are necessary to the amenity of the manor place, or, if the estate be held by burgage tenure, to dis-

Entail Amendment Act 1868.

pone any part thereof, reserving and excepting as aforesaid, subject to a ground-annual: Provided always, that the feu-duty, rent, or ground-annual to be stipulated for shall not be less than the amount ascertained as hereinafter provided: Provided also, that it shall not be lawful for such heir to take any grassum or fine or valuable consideration, other than the feu-duty, rent, or ground-annual for granting any such charter, lease, or disposition; and in case any such grassum, fine, or consideration shall be taken, such charter, lease, or disposition shall be null and void; but nothing herein contained shall prevent any heir of entail in possession from exercising any power of granting feu-charters, leases, or other grants which may be contained in the entail under which he possesses, more extensive than the powers hereby conferred.

4. [*Procedure in granting feus, building leases, &c.*].—For ascertaining whether the land so proposed to be feued, leased, or disposed may be feued, leased, or disposed in terms of the provisions of the preceding section, and the value of the same, an application shall be made by the heir in possession of the entailed estate to the Sheriff of the county within which the entailed estate, or the portion thereof proposed to be feued, leased or disposed, is situated, who thereupon shall direct notice to be given to the next heir of entail entitled to succeed to the entailed estate in such manner as shall seem proper (and in the event of such next heir of entail being under age, or subject to any legal incapacity, the Sheriff shall appoint a tutor *ad litem* or curator *ad litem* to such heir), and shall appoint one or more skilful persons to inquire and report as to the value of the lands proposed to be feued, leased or disposed, and whether from their position or otherwise they may or ought to be feued, leased or disposed in terms of the preceding section either in whole or in lots; and upon such person or persons reporting that the feu-duty, rent, or ground-annual offered is in their opinion, having regard to all the circumstances, fair and adequate, and that such land may, from its position, be feued, leased or disposed in terms of the preceding section, either in whole or in lots, the Sheriff, on consideration of the whole circumstances, may and is hereby empowered to authorise such heir in possession or his successor in the entailed estate at any time within ten years from the date of such deliverance to feu, lease, or dispose the said lands in one or more lots at such rate of feu-duty, rent, or ground-annual as he can obtain for the same, not being less than the rate fixed by the said skilled persons, subject to such conditions as the Sheriff may think essential to secure such feu-duty, rent or ground-

31 & 32 Vict., c. 84.

annual, and any other conditions he may see fit, and also subject to a nominal taxed sum of one penny sterling in lieu of all casualties on the entry of heirs and singular successors, and to grant the necessary feu charter, lease, or disposition, and which, being executed and recorded in the Register of Sasines, shall be effectual to all intents and purposes; and the lands so feued, leased or disposed shall, from the date of recording the feu charter, lease or disposition in the Register of Sasines, and so long as such feu charter, lease, or disposition shall remain in force, be held as out of the entail, and be liberated from all the prohibitory, irritant and resolute clauses or clause of registration thereof: Provided always that the superiority of the lands so feued, leased, or disposed, and the feu-duties, rents, and ground-annuals thereof, shall be and shall remain subject to the said entail in the same manner as the lands themselves were subject thereto previous to the granting of such feu charter, lease or disposition; and it is hereby provided, that the decree of the Sheriff pronounced on such application and proceeding shall not be subject to review by suspension, advocacy, or reduction, or in any other form, except by a short note of appeal to be presented to the Court of Session in one or other of the divisions thereof, which appeal shall be disposed of by such division as a summary cause: Provided always that unless such note of appeal shall be lodged with the clerk of the Division of the Court of Session, and notice thereof given in writing to the opposite party or his known agent, or lodged with the Sheriff-clerk, within six months of the date of the decree of the Sheriff, such decree shall be final and conclusive; and in the event of an appeal being duly taken and lodged the judgment of the Court of Session thereon shall be final and conclusive.

5. [*Feu charters, &c., to be void unless buildings of certain value erected and kept in repair.*].—Provided always that every such feu charter, lease, or disposition shall contain a condition that the same shall be void, and the same is hereby declared void, if buildings of the annual value of, at the least, double the feu-duty, rent or ground annual therein stipulated shall not be built within the space of five years from the date of such grant upon the ground comprehended therein, and that the said buildings shall be kept in good, tenantable, and sufficient repair, and that such grant shall be void whenever there shall not be buildings of the value foresaid, kept in such repair as aforesaid, standing upon the ground so feued, leased or disposed.

Service of Heirs.

CHAP. V.—SERVICE OF HEIRS.

31 and 32 Vict. c. 101.—An ACT to Consolidate the Statutes relating to the Constitution and Completion of Titles to Heritable Property in Scotland, and to make certain Changes in the Law of Scotland relating to Heritable Rights.—31st July 1868.

1. [*Short Title.*].—This Act may be cited for all purposes as “The Titles to Land Consolidation (*Scotland*) Act 1868.”

27. [*Services to proceed by petition to the Sheriff.*].—From and after the commencement of this Act it shall not be competent to issue brieves from Chancery for the service of heirs, or for any person to obtain himself served heir by virtue of any such brieve, or otherwise than according to the provisions of this Act; and every person desirous of being served heir to a person deceased, whether in general or in special, and in whatsoever character, and whether the lands which belonged to such person deceased were held by burgage tenure or were not held by burgage tenure, shall present a petition of service to the Sheriff in manner hereinafter set forth.

28. [*Petition to be presented to the Sheriff of the county, or to the Sheriff of Chancery.*].—In every case in which a general service only is intended to be carried through, such petition shall be presented to the Sheriff of the county within which the deceased had at the time of his death his ordinary or principal domicile, or, in the option of the petitioner, to the Sheriff of Chancery, and if the deceased had at the time of his death no domicile within *Scotland*, then in every such case to the Sheriff of Chancery; and in every case in which a special service is intended to be carried through, such petition shall be presented to the Sheriff within whose jurisdiction the lands or the burgh containing the lands in which the deceased person died last vest and seised are situated, or, in the option of the petitioner, to the Sheriff of Chancery, and in the event of the lands being situated in more counties than one, or in more burghs than one if such burghs are in different counties, then in every such case to the Sheriff of Chancery.

29. [*Nature and form of petition.*].—Every petition for service shall be subscribed by the petitioner, or by a mandatory specially authorised for the purpose, and shall be in the form or as nearly as may be in the form of one or other of the Schedules (P) and (Q) hereunto annexed, and shall, under the exceptions after-mentioned,

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set forth the particulars which, according to the law and practice existing prior to the fifteenth day of *November* One thousand eight hundred and forty-seven had been in use to be set forth with reference to a service sought to be carried through in any claim presented to a jury summoned under a brieve of inquest, and shall pray the Sheriff to serve the petitioner accordingly; Provided always that it shall not be necessary in such petition to set forth in any case the value of the lands either according to new or old extent, or the valued rent thereof, or of whom the lands are held, or by what service or tenure they are held, or in whose hands the same have been since the death of the ancestor, or whether or how long the same have been in non-entry, or that the petitioner is of lawful age, or that the ancestor died at the faith and peace of the Sovereign, but that in setting forth the death of the ancestor there shall also be set forth the date at or about which the said death took place, and in cases of general service, except as hereinafter provided, the county or place in which the deceased at the time of his death had his ordinary or principal domicile, and that in every place in which the petitioner claims to be served heir of provision, or of taillie and provision, whether in general or special, the deed or deeds under which he so claims shall be distinctly specified.

30. [*Services not to proceed till publication be made.*].—When any petition of service shall be presented to the Sheriff of any county, the service shall not proceed until publication shall be made in such county, nor until the Sheriff-clerk of the county shall have received from the Sheriff-clerk of Chancery official notice that publication has been made edictally in *Edinburgh*; and when such petition shall be presented to the Sheriff of Chancery, the service shall not proceed until publication shall have been made edictally in *Edinburgh*, nor until the Sheriff-clerk of Chancery shall have received official notice that publication has been made in the county of the domicile of the party deceased, when such domicile was within *Scotland*, or the county or counties in which the lands are situated, as the case may be; and the edictal publication in *Edinburgh* shall be at the office of the Keeper of Edictal Citations in the General Register Office, and in the same mode and form as in edictal citations; and in the county of the domicile, and in the county or counties where the lands are situated, by affixing on the doors of the Court-house, or in some conspicuous place of the Court, or of the office of the Sheriff-clerk of the county, as the Sheriff may direct, a short abstract of the petition, and there shall be no farther publication; and the form of such abstract, and

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the mode or form of the official notice of such publications, shall be those fixed and declared by the Court of Session, by Act of Sederunt, in virtue of the powers hereinafter mentioned.

31. [*Caveats to be received.*].—The sheriff-clerk shall be bound to receive any caveat against any petition of service to be presented to him, and on the receipt of the petition of service referred to in the caveat, or of any official notice of any such petition which may be communicated to such sheriff-clerk, such sheriff-clerk shall within twenty-four hours thereafter write and put into the post office a notice of such petition, addressed either to the agent by whom or to the person on whose behalf the caveat is entered, as may be desired in such caveat, and according to the name and address which shall be stated in such caveat, the sheriff-clerk receiving therefor a fee for his own use of such amount as shall be fixed by Act of Sederunt as aforesaid.

32. [*Petition of service to be equivalent to a brieve and claim.*].—A petition of service so presented shall, after expiration of the period hereinafter mentioned, be equivalent to and have the full legal effect of a brieve of service duly executed, and of a claim duly presented to the inquest, according to the law and practice existing prior to the fifteenth day of *November* One thousand eight hundred and forty-seven; and every petition of service, without further publication than is herein provided and has been or may be directed by Act of Sederunt, shall be held as duly published to all parties interested, and the decree to follow upon such petition shall not be questionable or reducible upon the ground of omission or inaccuracy in the observance by any officer or official person of any of the forms or proceedings herein prescribed, or which have been or shall be prescribed by Act of Sederunt made in relation to petitions of service.

33. [*Procedure before the Sheriff, and the effect of his judgment.*].—In regard to all petitions of service presented to the Sheriff of Chancery, or to the Sheriff of a county respectively, where the deceased died in *Scotland*, no evidence shall be led and no decree pronounced thereon by such Sheriff until after the lapse of fifteen days from the date of the latest publication, or where publication is to be made in *Orkney* or *Shetland*, or the petition is presented to the Sheriff of *Orkney* or *Shetland*, until after the lapse of twenty days from such date; and in regard to all petitions of service to be presented to the Sheriff of Chancery where the deceased died abroad, no evidence shall be taken and no decree pronounced thereon by him until after the lapse of thirty days from such date; and it shall be lawful, after

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the lapse of the times respectively above mentioned, to the Sheriff to whom such petition of service shall have been presented, by himself, or by the provost or any of the bailies of any city or royal or parliamentary burgh, or by any justice of the peace for any part of the United Kingdom, wherever such justice of the peace may happen to be for the time, whether within the United Kingdom or abroad, or by any notary-public, all of whom are hereby authorised to act as commissioners of such Sheriff without special appointment, or by any commissioner whom such Sheriff may appoint, to receive all competent evidence, documentary and parole, and any parole evidence so received shall be taken down in writing according to the practice in the Sheriff-courts of *Scotland* existing prior to the first day of *November* One thousand eight hundred and fifty-three, and a full and complete inventory of the documents produced shall be made out, and shall be certified by the Sheriff or his Commissioner aforesaid; and on considering the said evidence the Sheriff shall, without the aid of a jury, pronounce decree, serving the petitioner in terms of the petition, in whole or in part, or refusing to serve the said petitioner, and dismissing the petition, in whole or in part, as shall be just; and the said decree shall be equivalent to and have the full legal effect of the verdict of the jury under the brieve of inquest, according to the law and practice existing prior to the fifteenth day of *November* One thousand eight hundred and forty-seven.

84. [*Case where domicile of party is unknown.*—Where a general service only is intended to be carried through by an heir, it shall not be necessary, if the deceased died upwards of ten years prior to the date of presenting the petition for general service as heir to him, to state or prove the county within which the deceased had his ordinary or principal domicile at the time of his death; or that such domicile was furth of *Scotland*; but in such cases it shall be sufficient (so far as regards the domicile of the deceased) for the heir to state in his petition, and if required in the court of service to make oath, that he is unable to prove at what place the deceased had his ordinary or principal domicile at the time of his death: Provided always that in every such case, and in every case of general service where it is doubtful in what county the deceased had his ordinary or principal domicile, the petition for general service as heir to the deceased shall be dealt with, and all relative procedure shall be regulated in or as nearly as may be in the same manner as if it had been proved that the deceased had at the time of his death his ordinary or principal domicile furth of *Scotland*.

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35. [*Competing petition may be presented, and Sheriff, after receiving evidence give judgment.*].—It shall be lawful to any person who may conceive that he has a right to be served preferable to that of the person petitioning the Sheriff as aforesaid, also to present a petition of service to the Sheriff in manner and to the effect aforesaid, and the same shall be proceeded with in manner hereinbefore directed; and it shall be lawful to the Sheriff, if he shall see cause, at any time before pronouncing decree in the first petition, to sist procedure on the first petition in the meantime, or to conjoin the said petitions, and thereafter to proceed to receive evidence in manner hereinbefore directed, allowing each of the parties not only a proof in chief with reference to his own claim, but a conjunct probation with reference to the claims of such other parties; and the Sheriff shall, after receiving the evidence, pronounce decree on the said petitions, serving or refusing to serve as may be just, and shall at the same time dispose of the matter of expenses; and when the accounts thereof shall be audited and taxed in manner after provided, such Sheriff shall decern for the same.

36. [*Recording and extract of judgment.*].—On the application of the petitioner in whose favour a decree shall have been pronounced by the Sheriff, the Sheriff-clerk shall forthwith transmit to the office of the Director of Chancery the petition on which such decree was pronounced, together with such decree, the proof taken down in writing as aforesaid, and the inventories of written documents made up and certified as aforesaid, and also all other parts or steps of the process, excepting any original documents or extracts of recorded writs produced therewith, which, after decree is pronounced, shall be returned, on demand, to the parties producing the same; and on the proceedings being so transmitted to Chancery, such decree shall be recorded by the Director of Chancery, or his depute, in the manner and form directed or approved of, or to be directed or approved of from time to time by the Lord Clerk Register; and on such decree being so recorded, the Director of Chancery, or his Depute, shall prepare an authenticated extract thereof, and where such decree shall have been pronounced by the Sheriff of Chancery, shall deliver such extract to the party or his agent, and in all other cases shall transmit such extract without delay, and without charge or expense against the party in respect of the transmission and re-transmission, to the Sheriff-clerk of the county to be by him delivered to the party or his agent in the Sheriff-court; and such proceedings and decree shall, both prior and subsequent to the said transmission, be at all times patent and open

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to inspection in the office of the Sheriff-clerk and of the Director of Chancery respectively; and certified copies shall be given to any party demanding the same on payment of such fees as shall be fixed by Act of Sederunt as aforesaid; and in cases where an heir is served to an ancestor in several separate lands or estates under the same petition, it shall be competent for such heir to obtain separate extract decrees under the said petition applicable to one or more of such parcels of lands or separate estates, provided a prayer to that effect is inserted in the petition for service.

87. [*The extract decree to be equivalent to an extract retour.*].—The decree of service so recorded and extracted shall have the full legal effect of a service duly retoured to Chancery, and shall be equivalent to the retour of a service under the brieve of inquest according to the law and practice existing prior to the fifteenth day of *November* One thousand eight hundred and forty-seven; and the extract of such decree, or any second or later extract thereof, under the hand of the proper officer entitled to make such extracts for the time, shall be equivalent to and have the full legal effect of the certified extract of the retour formerly in use according to the law and practice existing prior to the said fifteenth day of *November* One thousand eight hundred and forty-seven; and the decree of service so recorded and extracted shall not be liable to challenge, nor be set aside, except by a process of reduction to be brought before the Court of Session as heretofore in use with regard to services duly retoured to Chancery.

88. [*Transmission of records.*]

89. [*Clerks of Chancery to be remunerated for keeping Register, &c. by Act of Sederunt.*]

40. [*No person entitled to oppose a service who could not appear against a brieve of inquest.*].—No person shall be entitled to appear and oppose a service proceeding before the Sheriff in terms of this Act who could not competently appear and oppose such service if the same were proceeding under the brieve of inquest according to the law and practice existing prior to the fifteen day of *November* One thousand eight hundred and forty-seven: and all objections shall be presented in writing, and shall forthwith be disposed of in a summary manner by the Sheriff, but without prejudice to the Sheriff, if he see cause, allowing parties to be heard *viva voce* thereon.

41. [*Appeal for jury trial.*].—In all cases in which competing petitions presented to the Sheriff in terms of the last-recited Act or of this Act have been or shall be conjoined as aforesaid, or in which any person has competently appeared or shall competently appear to

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oppose any petition of service presented to the Sheriff in terms of the said recited Act or of this Act, it shall be competent to any of the parties, at any time before proof is begun to be taken by the Sheriff in manner before provided, to remove the proceedings to the Court of Session by a note of appeal in or as nearly as may be in the form of a note of appeal under the "Court of Session Act 1868," which note of appeal shall be proceeded with in like manner with notes of appeal presented with a view to jury trial against judgments of the Sheriff-courts of *Scotland*, and such judgments shall be pronounced on the said note of appeal as shall be just; and in the event of it appearing proper that the cause should be tried by a jury, the same shall be tried according to the law and practice in trials by jury of causes in the Court of Session, and the jury shall be chosen and summoned in like manner as on such trials; and the verdict to be returned by the jury shall be equally final and conclusive with the verdicts returned in trials by jury in the said Court, but with all and the like remedies by bill of exceptions, motion for new trial, or otherwise, competent in regard to such verdicts: Provided always that in every case in which the jury shall find a verdict, or in which the Court shall pronounce a judgment in favour of a party petitioning to be served, the Court shall, at the same time with applying such verdict, or pronouncing such judgment, remit to the Sheriff from whom the cause was appealed, or before whom such petitions or petition would have depended if the same had not been advocated or appealed before the commencement of this Act, with instructions to pronounce a decree serving the said party in terms of this Act, which decree may thereafter be extracted, and the extract thereof recorded and given out in manner and to the effect before provided.

42. [*Where Sheriff refuses to serve petitioner, &c., judgment may be reviewed.*]—In every case in which the Sheriff, acting under the said Act of the Tenth and Eleventh of Her Majesty Queen *Victoria*, chapter forty-seven, or under this Act, has pronounced or shall pronounce a decree refusing to serve a petitioner, or dismissing his petition, or repelling the objection of an opposing party, it shall be lawful to bring the said decree under review of the Court of Session by a note of appeal, in or as nearly as may be in the form of a note of appeal under the "Court of Session Act 1868:" Provided always that such note shall be presented within fifteen, or, where the proceedings have been taken in the courts of *Orkney* or *Shetland*, twenty days from the date of the said judgment; and that where the decree has been pronounced after opposition duly entered or in competition,

such note shall be intimated to the opposite party, and such note shall be proceeded with in like manner with notes of appeal against final judgments of the Sheriff-courts; and it shall be competent to the Court of Session, if it shall appear necessary for the right determination of the cause, to allow further or additional evidence to be taken in any way or form in which evidence may be competently taken in ordinary civil causes depending before the said Court, or to appoint the cause, or special issues therein, to be tried by a jury, and such jury trial shall proceed in the same manner and to the like effect and with all and the like remedies as are before provided, and such judgment shall be pronounced on such note of appeal as shall be just: Provided always, that in every case in which the Sheriff has refused to serve, but in which the Court of Session shall determine that the party ought to be served, a remit shall be made to the Sheriff from whom such petition has been or shall be appealed, or before whom the same, if not advocated or appealed before the commencement of this Act, would have depended, with instructions to pronounce a decree serving the said party in terms of this Act, which decree may be thereafter recorded and extracted in manner and to the effect before provided: Provided also, that nothing herein contained shall prejudice the right of any person whose petition of service shall be refused without any opposing or competing party having appeared and been heard on the merits of the competition, to present a new petition at any time thereafter, or the right of either party in any of the proceedings authorised in the Court of the Sheriff, by this Act or the said Act of the Tenth and Eleventh of Her Majesty, chapter forty-seven, to bring under challenge whatever decree may have been or may be pronounced therein by process of reduction before the Court of Session on any competent ground.

43. [*Procedure when a decree of service is brought under reduction. Effect of the decree of reduction.*].—In every case in which a process of reduction of any decree of service pronounced by any Sheriff acting under the said last-recited Act or this Act has been or shall be brought before the Court of Session, it shall be competent to the said Court, if it shall appear necessary for the right determination of the cause, either to allow further or additional evidence to be taken in any way or form in which evidence may be competently taken in ordinary civil causes depending before the said Court, or to appoint the cause, or special issues therein, to be tried by a jury; and such jury trial shall proceed in the same manner, and to the like effect, and with all and the like re-

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medies as are before provided in regard to jury trials under notes of appeal, and such judgment shall be pronounced in the said process as shall be just: Provided always that wherever the decree of the Sheriff brought under reduction has proceeded on competing petitions conjoined as aforesaid, and the Court of Session shall determine that a different person shall be served from the person preferred by the Sheriff, a remit shall be made to the Sheriff acting under this Act before whom the said competing petitions depended, or to the Sheriff before whom the same would have depended if the said decree had not been pronounced before the commencement of this Act, with instructions to pronounce a decree serving such different person in terms of this Act, which decree may be thereafter recorded, and an extract thereof given out in manner and to the effect above provided; and in any case of reduction of a service the judgment shall, unless and until reversed by the House of Lords on appeal, be conclusive, as between the parties to the suit, against the party whose service is reduced, and shall have the same effect as if the action had contained a conclusion of declarator that the party served was not entitled to be served in the character claimed, and judgment had been pronounced in terms of that conclusion.

44. [*Forms and effect of procedure in the Court of Session.*].—All proceedings authorised by the present Act to be taken in the Court of Session in reference to appeals from the Sheriff, or to reduction of decrees of service, shall commence and be carried on in the same manner with proceedings of the same description in ordinary civil causes; and all judgments to be pronounced by the Court of Session in such proceedings in terms of this Act, or in the corresponding proceedings in terms of the said last-recited Act, shall be equally final and conclusive as the judgments pronounced by the said Court in ordinary civil causes, and shall not be liable to review by reduction or otherwise, save and except to such extent and effect as judgments by the said Court in ordinary civil causes are so liable: Provided always that it shall be competent to appeal against the said judgments to the House of Lords in like manner as against judgments of the Court in ordinary civil causes aforesaid.

45. [*"Court of Session Act 1868" to apply to appeals and reductions, &c., under this Act.*].—The whole provisions of "The Court of Session Act 1868" shall, in so far as possible, apply to notes of appeal and processes of reduction under this Act, and to all advocations from the Sheriff, and to all processes of reduction of decrees of service in dependence in the Court of Session at the commencement of this

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Act, and to all advocations which may after the commencement of this Act come before the Inner-House of the Court of Session by report or reclaiming note from any Lord Ordinary : Provided always that the advocations depending before the Outer-House of said Court at the commencement of this Act shall be disposed of in the Outer-House, according to the law and practice existing prior to the commencement of the said " Court of Session Act 1868."

46. [*A decree of special service, besides operating as a retour, shall have the operation and effect of a disposition from the deceased to his heirs and assignees.*]

47. [*A special service not to infer a general representation, either active or passive.*]

48. [*Petitioner for special service may petition for general service.*]
—In any petition for special service, in whatever character, it shall be competent to the petitioner to pray for general service in the same character as that in which special service is sought, and decree may be pronounced in terms of such prayer as well as for special service ; and no further notice or publication of the petition of service shall in such case be necessary than is hereby required for such petition of special service.

49. [*A general service may be applied for and obtained to a limited effect by annexing a specification ; and it shall infer only a limited passive representation.*].—It shall be lawful for any person presenting a petition for general service to a deceased person, to state in such petition, in the form or as nearly as may be in the form No. 1 of Schedule (R) hereunto annexed, that he desires the effect thereof to be limited to certain lands which belonged to the deceased, and which shall be embraced in a particular specification thereof to be annexed to such petition for general service, which specification shall be in the form or as nearly as may be in the form No. 2 of the said Schedule (R), and shall be subscribed by the petitioner or his mandatory ; and in preparing an abstract of such petition for insertion in the Minute Book of the Court in which it shall be presented, and for publication, it shall be described as a petition for general service with specification annexed ; and the Sheriff to whom such petition for general service with specification annexed shall be presented shall, in pronouncing decree of service on such petition, make reference to the specification annexed thereto, and shall limit such decree of service to the lands described in the said specification, and the effect of such decree shall accordingly be taken and held in law to be so limited ; and a copy of such specification shall be embodied in the extract of the said decree,

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and recorded as part thereof; and every such decree of general service obtained in virtue of said last recited Act or of this Act, with specification annexed, shall infer only a limited passive representation of the deceased; and the person thereby served as heir shall be liable in respect of such service for the deceased's debts and deeds only to the extent or value of the lands contained in the relative specification.

50. [*Jurisdiction of the Sheriff of Chancery.*—The Sheriff of Chancery appointed or to be appointed in virtue of this Act shall have and possess such and the like authority and jurisdiction to entertain, try, and adjudicate, but in the manner prescribed and directed by this Act, all questions of and relating to the service of heirs, as the Sheriff of Chancery appointed in virtue of the said recited Act Tenth and Eleventh of the reign of her present Majesty, chapter forty-seven, or any Sheriff or Judge Ordinary, now has and possesses in any case competent before such Sheriff or Judge Ordinary, or in any case now or formerly competent before the Sheriff of *Edinburgh* acting on special commission; and such Sheriff of Chancery shall hold his court in any court-room within the Parliament or new Session-house of *Edinburgh* which has been or may be assigned by the Lords of Session for that purpose, or in any other place which may be so assigned.

51. [*Power to the Court of Session to pass Acts of Sederunt.*]*

52. [*Appointment of Sheriff of Chancery.*]

53. [*Agents may practice before Sheriff-courts.*—It shall be lawful and competent for agents qualified to practise before the Court of Session or before any Sheriff-court, to practise before the Sheriff of Chancery as well as in the ordinary Sheriff-courts in petitions of service.

54. [*Salaries of Sheriff of Chancery and Sheriff-clerk of Chancery.*]

55. [*Salary to be regulated by the Commissioners of the Treasury on Vacancy.*]

56. [*Compensation already awarded not to be affected.*]

57. [*Compensation to be paid.*]

58. [*Provisions as to depending petition for service.*]†

* By § 162, the Acts of Sederunt passed under the previous Service of Heirs Act (1847) are kept in force until the Court of Session shall pass others.

† Petitions depending under the former Act are to be taken up and carried on as if they had been presented under this Act.

SCHEDULES referred to in the foregoing Act.

SCHEDULE (P).

Form of Petition of General Service.

Unto the Honourable the Sheriff of [*specify the county or say "of Chancery,"*] the petition of *A B* [*here name and design the petitioner*].

Humbly sheweth,

That the late *C D* [*here name and design the ancestor to whom service is sought*] died on or about the day of and had at the time of his death his ordinary or principal domicile in the county of [or furth of Scotland, *as the case may be*. In cases where the deceased died upwards of ten years before the date of the petition, and the petitioner cannot ascertain the place of the domicile, say, that the late *C D* (*here name and design the ancestor to whom service is sought*) died on or about the day of , but the petitioner is unable to prove at what place the deceased had his ordinary or principal domicile at the time of his death].

That the petitioner is the eldest son [*or state what other relationship or character of heir the petitioner bears*] and nearest lawful heir in general of the said *C D*. [*If the service is as heir of provision, say, that the petitioner is the eldest son (or state what other relationship or character of heir the petitioner bears) and nearest lawful heir of provision in general of the said C D, under and by virtue of a deed (specify the deed of provision) executed by E F, dated the day of , or otherwise describe the deed so as to clearly identify it; or, if the service is as heir of tailzie, say, that the petitioner is the eldest son (or state what other relationship, &c., the petitioner bears), and nearest and lawful heir of tailzie and provision in general of the said C D, under and by virtue of a disposition and deed of entail granted by E F, dated the day of , and recorded in the Register of Tailzies the day of , whereby the said E F conveyed the lands of M to and in favour of J K (here set forth the destination or such part thereof as may be deemed necessary, or say, and the other heirs therein mentioned; but always with and under the conditions, provisions, and prohibitory, irritant, and resolute clauses or clause authorising registration in the Register of Tailzies, as the case may be) contained in the said recorded deed of entail, and here referred to as at length set forth therein.*]

May it therefore please your Lordship to serve the petitioner nearest and lawful heir in general to the said *C D* [*or whatever other character of heir is sought to be established here set it forth*].

According to Justice, &c.

[Signed by the petitioner or his mandatory.]

Service of Heira.

SCHEDULE (Q).

Form of Petition of Special Service.

Unto the Honourable the Sheriff of [*specify the county, or say, "of Chancery,"*] the petition of *A B* [*here name and design the petitioner*],

Humbly sheweth,

That the late *C D* [*here name and design the ancestor*] died on or about the day of [*state the month and the year at full length*], last vest and seised in [*here describe or refer as in Schedule (E)* or Schedule (G)† to the lands with reference to which the service is sought*] conform to disposition [*or other deed or conveyance*] dated the day of and along with warrant of registration thereon, on behalf of the said *C D*, recorded in the Register of Sasines (*specify register*) on the day of [*or conform to disposition, or whatever else was the deed or conveyance on which the ancestor's infestment proceeded, here specify it*], dated the day of and to Instrument of Sasine following thereon recorded in the Register of

* SCHEDULE (E).

Clause of Reference to Particular Description contained in a Prior Deed.

[*After giving some leading name or names or some other distinctive description of the lands as contained in the titles thereof and the name of the county, and, in the case of lands held by burgage tenure, the name of the burgh and county in which the lands lie, add*] being the lands [*or subjects*] particularly described in the [*here specify a prior deed or instrument containing the particular description of the lands or subjects*] recorded [*specify Register of Sasines, or if the deed or instrument as recorded has been previously referred to say, in the said deed (or instrument) recorded as aforesaid*] on the day of in the year .

[*If part only of lands is conveyed, describe such part and add, being part of the lands particularly described, &c.; or thus, being the lands (or subjects) as particularly*

described, &c., with the exception of, and describe the part excepted.]

† SCHEDULE (G).

Clause of Reference to Conveyance, containing General Designation of Lands.

[*After giving the general name or names of the lands and the name of county, or burgh and county, as the case may be, add*] [*as particularly described in the disposition (or other deed, as the case may be) granted by C D, and bearing date (here insert date), and recorded in the (specify the Register of Sasines) on the day of in the year , and in which the lands hereby conveyed are declared to be designed and known by the said name of (here insert name), (or "as particularly described in the instrument (specify instrument) recorded, &c., and in which the lands hereby conveyed are declared," &c.)*] [*If part only of lands is conveyed, then follow form for similar case given in Schedule (E).*

81 & 82 Vict. c. 101.

Sasines (*specify register*) on the day of , [or otherwise specify the title of the deceased as recorded in the Register of Sasines; and when the lands are held under a deed of entail, here insert the conditions, &c., at full length, or refer to them in or as nearly as may be in the form of Schedule (C),* or, if desired, refer to them as follows] but always with and under the conditions, provisions, and prohibitory, irritant, and resolute clauses [or clause authorising registration in the Register of Tailzies, as the case may be], contained in a deed of entail granted by G H [here name and design the grantor], dated the day of , in favour of I K [here set forth the destination, or such part thereof as may be deemed necessary, or say, and the heirs therein specified], and which conditions, provisions, and prohibitory, irritant, and resolute clauses [or clause authorising registration in the Register of Tailzies, as the case may be], are herein referred to as at length set forth in the said deed of entail, which is recorded in the Register of Tailzies on the day of [or, as at length set forth in the above mentioned recorded disposition, or other deed or conveyance in favour of the deceased, or as at length set forth in any other recorded deed or conveyance. And in every case where there are any real burdens, conditions, provisions or limitations, proper to be inserted or referred to, insert them here, or refer to them in or as nearly as may be in the form of Schedule (D)].†

* SCHEDULE (C).

Clause of Reference to Destinations and Conditions of Entail, &c.

[After inserting such part of the destination as may be thought necessary, add] and to the other heirs specified in a disposition and deed of entail [or as the case may be] of the said lands executed by the deceased E F, dated the day of in the year , and recorded in the Register of Tailzies on the day of in the year [or in the said disposition and deed of entail dated and recorded as aforesaid, or in a deed or instrument (*specify the deed or conveyance*)] recorded [*specify Register of Sasines*] upon the day of in the year .

[And after the description of the lands insert] but always with and under the conditions, provisions, and prohibitory, irritant and resolute clauses [or clause autho-

rising registration in the Register of Tailzies, as the case may be], contained in the said disposition and deed of entail, dated and recorded as aforesaid [or in (*specify deed or conveyance*) recorded in (*specify Register of Sasines*) upon the day of in the year].

[And in subsequent clauses in which it is usual or requisite to refer again to the conditions of the entail, &c., the reference may be made thus:] but always with and under the conditions, provisions, and prohibitory, irritant and resolute clauses [or clause authorising registration in the Register of Tailzies, as the case may be] before referred to.

† SCHEDULE (D).

Clause of Reference to Real Burdens, Conditions, &c., in Investiture.

[After the description of the lands, instead of inserting the burdens, &c.,

Service of Heirs.

That the petitioner is the eldest son [or state what other relationship or character the petitioner bears] and nearest lawful heir in special of the said *C D* in the lands and others foresaid. [If the service is as heir of provision, say, that the petitioner is the eldest son (or state what other relationship or character the petitioner bears) and nearest lawful heir of provision in special of the said *C D* in the lands and others foresaid, under and by virtue of a deed (or other conveyance) executed by *E F*, dated (here describe the deed or conveyance by date or otherwise, describe it so as clearly to identify it). And if the service is as heir of entail, say, that the petitioner is the eldest son (or state what other relationship or character the petitioner bears) and nearest and lawful heir of tailzie and provision in special of the said *C D* in the lands and others foresaid, under and by virtue of the said deed of entail].

[If it is wished to embrace a service in general in the same character as that in which special service is sought, say, That the petitioner is likewise heir in general, or of provision in general, or of tailzie and provision in general, or otherwise, as the case may be, of the said *C D*].

May it therefore please your Lordship to serve the petitioner nearest and lawful heir [or heir of provision, or heir of tailzie and provision, or otherwise, as the case may be] in special of the said deceased *C D* in the lands and others above described [and where a general service is wished, add, and likewise nearest and lawful heir, or heir of provision, or heir of tailzie and provision in general of the said *C D* (or whatever else is the character of heir sought to be established, here set it forth as above). And where the service is as heir of tailzie and provision, say here, but always with and under the conditions, provisions, prohibitory, irritant, and resolute clauses (or clause authorising registration in the Register of Tailzies) above referred to (or above written); and where there are real burdens, &c., say, but always with and under the real burdens, &c., above referred to (or above written). And

at length, these may be referred to as follows, viz.:] but always with and under the real burdens, conditions, provisions, and limitations [or such of these as may apply or have reference to the case] specified in a deed [or instrument, here specify a deed or conveyance in which the burdens, &c., were first inserted, or any subsequent deed or conveyance in which they are inserted, forming part of the progress of the titles to the lands] recorded [specify Register of Sasines,

or, if the deed or conveyance as recorded has been previously referred to, say in the said deed (or instrument) recorded as aforesaid] on the day of _____ in the year _____.

[And in subsequent clauses in which it is requisite or usual to refer again to the burdens, &c., the reference may be made thus:] but always with and under the real burdens, conditions, provisions, and limitations [or such of these as may apply or have reference to the case] before referred to.

81 & 82 Vict. c. 101.

where there are several parcels of land or separate estates, here add, if desired, and to grant warrant to the Director of Chancery to issue separate extract decrees applicable to one or more of such parcels of lands or separate estates].

According to Justice, &c.

[Signed by the petitioner or his mandatory.]

SCHEDULE (R).

Form for a General Service where it is to be limited in its effects by a Specification annexed.

No. 1.

The petition will be in the form of Schedule (P), adding at the close of the statement of the petitioner, But the petitioner desires that his general service shall be limited to the contents of the specification annexed; and adding at the close of the prayer of petition, but under limitation as aforesaid to the contents of the specification annexed.

No. 2.

Specification of the lands and other heritages which belonged to the deceased *C D*, referred to in the petition for general service presented to the Sheriff of _____ by *A B*, as heir of _____ in general to the said deceased *C D*.

[Here insert a description of the lands and other heritages intended to be included in the service, distinguishing each separate property or heritage, if there are more than one, by a separate number.]

[Signed by the petitioner or his mandatory.]

ACT OF SEDERUNT to Regulate Publication in Services, and the Fees of Sheriff-clerks therein.—Edinburgh, 14th July 1847.—[Made permanent by Act of Sederunt, 17th November 1849.]

The Lords of Council and Session, in pursuance of the powers vested in them by the Act of Parliament passed in the 10th and 11th years of her present Majesty's reign, chapter 47, intituled "An Act to amend the Law and Practice in Scotland as to the Service of Heirs," declare,—

I. That the abstracts to be published in regard to general and special services before the Sheriffs of counties and the Sheriff of Chan-

cery, shall be in the forms, or as nearly as may be in the forms, following, according to the circumstances of the case:—

Service of Heirs.

1. *Abstract of Petition for General Service, when presented to the Sheriff of a County.*

Petition for general service to the Sheriff of [here name the county] by A B [here name and design the petitioner] as [here mention the relationship and character as stated in the petition] in general to the deceased C D [here name and design the deceased] whose ordinary or principal domicile at the period of his death was in the said county.

Presented on the [here mention the date of presenting the petition].

2. *Abstract of a Petition for Special Service, when presented to the Sheriff of a County.*

Petition for special service to the Sheriff [here name the county] by A B [here name and design the petitioner] as [here mention the relationship and character as stated in the petition] in special to the deceased C D [here name and design the deceased] in the lands of [here mention the general designation or leading name, and if there be more parcels than one, the leading names of the lands described in the petition].

Presented on the [here mention the date of presenting the petition].

3. *Abstract of a Petition for General Service, when presented to the Sheriff of Chancery.*

Petition for general service to the Sheriff of Chancery by A B [here name and design the petitioner] as [here mention the relationship and character as stated in the petition] in general to the deceased C D [here name and design the deceased] whose ordinary or principal domicile at the period of his death was in the county of [here name it, or who died domiciled furth of Scotland].

Presented on the [here mention the date of presenting the petition].

4. *Abstract of a Petition for Special Service, when presented to the Sheriff of Chancery.*

Petition for special service to the Sheriff of Chancery by A B [here name and design the petitioner] as [here mention the relationship and character as stated in the petition] in special to the deceased C D [here name and design the deceased] in the lands of [here mention the general designation or leading name, and, if there be more parcels than one, the leading names of the lands described in the petition] situate in the county of [here name it, or if in more counties than one, say, in the counties of and].

Presented on the [here mention the date of presenting the petition].

II. That in making edictal publication of all services, an abstract, in the form above prescribed, as suitable to the case, shall be left by the sheriff-clerk of Chancery at the office of the Keeper of the Register of Edictal Citations, and shall be entered by him in a separate book, to be kept by him for that purpose, and shall be printed and published weekly in the print-

ed record of edictal citations, which, so far as regards the purposes of this enactment, shall be a weekly publication.

III. That the official notices of publication shall be required and given by the several sheriff-clerks, whether of counties or of Chancery, in the following forms, or as nearly as may be in these forms:—

A. S. 14th July 1847.

1. *Requisition from the Sheriff-clerk of a County to the Sheriff-clerk of Chancery.*

[Place and date.]

SIR,—I request you to publish edictally the service of which an abstract is subjoined, and to send me immediate notice of your having done so. I am, &c.

[Signature and designation.]

[Here copy the abstract.]

2. *Answer by the Sheriff-clerk of Chancery to the above.*

Edinburgh, [Date.]

SIR,—I have received your requisition of the [date], which I return inclosed, with a certificate of publication annexed to it. I am, &c.

[Signature and designation.]

3. *Certificate of publication to be so annexed by the Sheriff-clerk of Chancery.*

Edinburgh, [Date.]

I hereby certify that the before-written abstract was edictally published by me this day.

[Signature and designation.]

4. *Requisition from the Sheriff-clerk of Chancery to the Sheriff-clerk of a County.*

Edinburgh, [Date.]

SIR,—I request you to publish in your county the service of which an abstract is subjoined, and to send me immediate notice of your having done so. I am, &c.

[Signature and designation.]

[Here copy the abstract.]

5. *Answer by the Sheriff-clerk of the County to the above.*

[Place and date.]

SIR,—I have received your requisition of the [date], which I return inclosed, with a certificate of publication annexed to it. I am, &c.

[Signature and designation.]

6. *Certificate of publication to be so annexed by the Sheriff-clerk of the County.*

[Place and date.]

I hereby certify that the before-written abstract was duly published in this county by me this day.

[Signature and designation.]

IV. That the requisition for publication above prescribed shall be made by the Sheriff-clerk, whether of a county or of Chancery, with whom the petition for service has been lodged, without delay after his receiving such petition, in a post-paid letter; and the publication shall be made, and the prescribed answer to such requisition

shall be returned, likewise in a post-paid letter, without delay.

V. That when a petition of service is lodged with the Sheriff-clerk of any county he shall receive from the party presenting the same the fee payable to the Sheriff-clerk of Chancery for the edictal publication thereof and shall, once in each year, at a period and in the manner

Service of Heirs.

to be appointed under proper authority, make due accounting to the Sheriff-clerk of Chancery therefor. And when a petition of service shall be lodged with the Sheriff-clerk of Chancery, he shall receive from the party presenting the same the fee payable to the Sheriff-clerk of the county in which such service has to be published for such publication thereof, and shall, once in each year, at a period and in the manner to be appointed under proper authority, make due accounting to the Sheriff-clerk of such county therefor.

VI. And to obviate doubts in re-

gard to the form of extracts of decrees of general service, which, in terms of the 25th section of the said Statute, are limited to certain lands and heritages embraced in a particular specification thereof annexed to the petition for service, it is declared that such specification shall be signed by the Sheriff-clerk, but it shall not be necessary that the copy thereof to be embodied in such extracts shall be so signed.

VII. And, until otherwise ordered by Act of Sederunt, the following fees shall be exigible by Sheriff-clerks for the business done under the foresaid Act of Parliament.

TABLE OF FEES.

FEES TO BE PAID IN THE OFFICE OF CHANCERY.

For extracting decrees of service (including recording), each sheet of said extract, or part of a sheet, of 300 words, . . .	*£0 2 0
For certified copies of proceedings in services, when required by the party, each sheet, or part of a sheet, of 300 words, . . .	0 2 0
For inspection of each book of record, having a corresponding index of reference, . . .	0 2 6
For inspection of the proceedings in a service, . . .	0 2 6
For searches in the indices in the books of record:—	
(1) For any period not exceeding 1 year, a fee of . . .	0 2 6
(2) For any period from 1 year to 10 years inclusive, a fee of . . .	0 5 0
(3) For any longer period, . . .	0 10 0
For transmitting the proceedings in a service on the warrant of the Court of Session, . . .	0 7 6
For each attendance to exhibit a book or books of record, where the same may be lawfully required, a fee of . . .	0 5 0

FEES TO BE PAID TO THE SHERIFF-CLERK OF CHANCERY, AND SHERIFF-CLERKS OF COUNTIES.

Fee to be received on presenting the petition, whether of general or special service, whereof one-half to be retained by the Sheriff-clerk receiving it, and the other half accounted for by him to the Sheriff-clerk who assists in the publication of the petition, and to cover correspondence, framing of abstracts, publication, and postages, . . .	£0 10 0
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In General Services.

For attending at service, and framing and recording minutes, . . .	0 8 6
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* Raised to 8s. 6d. by Act of Sederunt 17th November 1849. In each service carried through before the

Sheriff of Chancery, the Macer (under the same Act of Sederunt) gets a fee of 2s.

A. S. 14th July 1847.

In litigated cases, the clerk or assistant-clerk to be paid for writing the proof, at the rate, per sheet of 300 words, of	0	0	6
For general trouble connected with the service, . . .	0	10	0
For writing decree of service, . . .	0	2	6

In Special Services.

For framing and recording minutes (including attendance at the service) :—

For the first sheet of 300 words, . . .	0	8	6
Every following sheet, . . .	0	2	0
For general trouble connected with the service, . . .	0	15	0
For writing decree of service, . . .	0	5	0

In litigated cases, the clerk or assistant-clerk to be paid for writing the proof, at the rate, per sheet of 300 words, of	0	0	6
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NOTE.—In all cases, the additional procedure occurring when the service is opposed to be paid for by the parties according to the rates chargeable by the respective Sheriff-clerks in ordinary business, and in the case of the Sheriff-clerk of Chancery, according to the rates chargeable by the Sheriff-clerk of Edinburgh, as regulated by the Act 1st and 2d Vict., cap. 119.

Caveats.

For each caveat (to be effectual for one year), the Sheriff-clerk to receive for his own use, in all cases, . . .	0	2	6
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PART III.

SMALL DEBT COURT.

1 Vict., c. 41—An ACT for the more effectual Recovery of Small Debts in the Sheriff-Courts, and for regulating the Establishment of Circuit Courts for the Trial of Small Debt Causes by the Sheriffs in *Scotland*.—12th July 1837.

Whereas an Act was made in the tenth year of the reign of his Majesty King George the Fourth, intituled, *An Act for the more effectual Recovery of Small Debts, and for diminishing the expenses of Litigation in causes of small amount in the Sheriff-courts in Scotland* (10 Geo. IV., c. 55), the provisions of which have been found beneficial, but experience has pointed out certain alterations by which its benefits will be extended and rendered more effectual; and it is expedient that such alterations and the former provisions should be consolidated in one Act: Be it therefore enacted by the Queen's most excellent

Small Debt Act 1837.

Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same.

[*Recited Act repealed, except as to causes commenced.*].—That the said recited Act shall be and the same is hereby repealed from and after the first day of *October* next, save and except as to such causes as shall have been commenced under the authority of the said recited Act before the said first day of *October* next, and shall be then depending, all which causes shall be carried to a conclusion according to the rules prescribed by the said Act, notwithstanding this Act; and this Act shall commence and take effect from and after the said first day of *October* next.

2. [*Sheriffs may hear and determine in a summary way causes for sums under £8, 6s. 8d. sterling.*].—And be it enacted that it shall be lawful for any Sheriff in *Scotland* within his county to hear, try, and determine in a summary way, as more particularly hereinafter mentioned, all civil causes and all prosecutions for statutory penalties, as well as all maritime civil causes and proceedings that may be competently brought before him, wherein the debt, demand, or penalty in question shall not exceed the value of eight pounds six shillings and eight-pence sterling,* exclusive of expenses and fees of extract: Provided always that the pursuer or prosecutor shall in all cases be held to have passed from and abandoned any remaining portion of any debt, demand, or penalty beyond the sum actually concluded for in any such cause or prosecution.

3. [*Providing forms of proceedings.*].—And be it enacted that all such causes and prosecutions which the pursuers or prosecutors thereof shall choose to have heard and determined according to the summary mode hereby provided shall proceed, except as hereinafter provided, upon summons or complaint, agreeably to the form in Schedule (A) annexed to this Act, and containing warrant to arrest upon the depending action, stating shortly the origin of debt or ground of action, and concluding against the defender; which summons or complaint, being signed by the sheriff-clerk, shall be a sufficient warrant and authority to any sheriff's officer for summoning the defender to appear and answer at the time and place mentioned in such summons and complaint, not being sooner than upon the sixth day after such cita-

* This Act is to be read and construed as if the words "twelve pounds" were substituted for the words "eight pounds six shillings

and eightpence" wherever the latter words occur (16 & 17 Vict., c. 80, § 26, *supra*, p. lxxxi).

1 Vict. c. 41.

tion, and the same, or the copy thereof, served on the defender, shall also be a sufficient warrant for summoning such witnesses and havers as either party shall require; and a copy of the said summons or complaint, with the citation annexed, and also a copy of the account, if any, shall be served at the same time by the Sheriff's officer on the defender personally or at his dwelling-place, or, in case of a company, at their ordinary place of business; and the officer summoning parties, witnesses, or havers, shall in all cases under this Act return an execution of citation signed by him, or shall appear and give evidence on oath of such citation having been duly made; and all such citations given by an officer alone without witnesses, and executions thereof subscribed by such officer, shall be good and effectual to all intents and purposes.

4. [*Causes of higher value than £8, 6s. 8d., reduced to £8, 6s. 8d. may be remitted to the Small Debt Roll.*].—And be it enacted that in any cause before the Sheriff's ordinary-court, in which the debt, demand, or penalty in question, shall not exceed the value of eight pounds six shillings and eightpence sterling, or shall have exceeded the value of eight pounds six shillings and eightpence sterling, but from interim decree or otherwise the value shall, previous to the closing of the record, be reduced so as not to exceed eight pounds six shillings and eightpence sterling, exclusive of expenses and fees of extract, it shall be competent to the Sheriff, if he shall think proper, and with the consent of the pursuer, to remit such cause to such of his Small Debt Court Rolls as may be proper, either of his own motion or upon the motion of any party in the cause: Provided that if the pursuer shall not consent, the provisions of this Act as to the fees or expenses to be allowed in causes below the value of eight pounds six shillings and eightpence brought not according to the summary form herein provided, shall be applied to such causes subsequent to the proposition for remit, if the Sheriff shall think proper so to modify the expenses: Provided also that, when a case has been remitted by the Sheriff-substitute from the ordinary-court to the Small Debt Court, an appeal shall be competent to the Sheriff against such remit, but no reclaiming petition shall be allowed against such remit.

5. [*Recovery of rents not exceeding £8, 6s. 8d.*].—And be it enacted that it shall be competent for the Sheriff in the Small Debt Courts established or to be established under this Act, to hear, try, and determine, in the summary form herein provided, applications by landlords or others having right to the rents and hypothec for sequestration and sale of a tenant's effects for recovery of rent, provided the

Small Debt Act 1837.

rent or balance of rent claimed shall not exceed eight pounds six shillings and eightpence sterling; and the summons and warrant of sequestration and procedure shall be agreeable to the forms directed in the Schedule (B) annexed to this Act; and the officer when he executes the warrant, shall get the effects appraised by two persons, who may also be witnesses to the sequestration; and an inventory or list of the effects, with the appraisement, shall be given to or left for the tenant, who shall be cited in manner and to the effect aforesaid; and an execution of the citation and sequestration, with the appraisement of the effects, shall be returned to the clerk within three days; and, on hearing the application in manner provided by this Act relative to other causes, the Sheriff shall dispose of the cause as shall be just, and may either recall the sequestration in whole or in part, or pronounce decree for the rent found due, and grant warrant for the sale of the sequestered effects on the premises, or at such other place and on such notice as he shall by general or special regulation direct, and failing such directions the sale shall be carried into effect in the manner hereinafter directed for the sale of pointed and sequestered effects; and if after sequestration the tenant shall pay the rent claimed, with the expenses, to the pursuers, or consign the rent, with two pounds sterling to cover expenses, in the hands of the clerk of court, the sequestration shall *ipso facto* be recalled, in case of payment, on the clerk writing and signing on the back of the summons or warrant the words "payment made," which, on evidence being produced to him of payment of the rents claimed, with expenses, he is hereby required to do, and in case of consignment after the clerk shall in like manner have written and signed the words "consignation made," on the same being intimated by an officer of court to the sequestering creditor.*

6. [*Arrestment of goods of defender.*].—And be it enacted that the pursuer of any civil cause, including maritime civil causes and proceedings, may use arrestment on the dependence of the action of any money, goods, or effects, to an amount or extent not exceeding the value of eight pounds six shillings and eightpence sterling, owing or belonging to such defender, in the hands of any third party, either within the county in which such warrant shall have been issued or in any other county or countles: Provided always that before using such warrant in any other county it shall be presented to and

* Extended to sequestrations *currente termino* (16 and 17 Vict. c. 80 § 28, *supra*, lxxxii).

1 Vict., c. 41.

indorsed by the sheriff-clerk of such other county, who is hereby required to make such indorsement on payment of the fee hereinafter mentioned: Provided also that any arrestment laid on under the authority of this Act shall, on the expiry of three months from the date thereof, cease and determine, without the necessity of a decree or warrant of loosing the same, unless such arrestment shall be renewed by a special warrant or order, duly intimated to the arrestee, in which case it shall subsist and be in force for the like time and under the like conditions as under the original warrant, or unless an action of forthcoming or multiplepoinding, in manner hereinafter provided, shall have been raised before the expiry of the said period of three months, in which case the arrestment shall subsist and be in force until the termination of such action of forthcoming or multiplepoinding.

7. [*Wages not liable to arrestment.*].—And be it enacted and declared that wages of labourers and manufacturers shall, so far as necessary for their subsistence, be deemed alimentary, and, in like manner as servant's fees, and other alimentary funds, not liable to arrestment.*

8. [*For providing how arrestments may be loosed.*].—And be it enacted that when any arrestment shall have been used on the de-

* 8 & 9 Vict., c. 39.—An Act to amend the Law of Arrestment of Wages in Scotland.—21st July 1845.

“Whereas an Act was passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled *An Act to alter and amend an Act passed in the thirty-ninth and fortieth years of King George the Third, for the Recovery of Small Debts in Scotland*: and whereas another Act was passed in the first year of the reign of her present Majesty, intituled *An Act for the more effectual Recovery of Small Debts in the Sheriff-courts, and for regulating the Establishment of Circuit Courts for the Trial of Small Debt Causes by the Sheriffs in Scotland*: and whereas it is expedient that the said Acts

should be amended as regards the arrestment of wages:”—

[*Arrestment of wages not competent on dependence of action.*].—Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this Act it shall not be lawful or competent to arrest wages upon the dependence of any action raised by virtue of the said recited Acts, anything therein contained to the contrary notwithstanding.

2. [*Alteration of Act.*].—And be it enacted that this Act may be amended or repealed by any Act to be passed during the present session of Parliament.

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pendence of any action, it shall be competent to the defender to have such arrestment loosed on lodging with the sheriff-clerk of the county in which such arrestment shall have been used a bond or enactment of caution, by one or more good and sufficient cautioners, to the satisfaction of such sheriff-clerk, agreeably to the form in schedule (C) annexed to this Act, or on consigning in the hands of such sheriff-clerk the amount of the debt or demand, with five shillings for expenses in case of actions for sums below five pounds, and ten shillings in cases of higher amount, or on producing to such sheriff-clerk evidence of the defender having obtained decree of absolvitor in the action, or of his having paid the sums decerned for, or of his having consigned in the hands of the clerk of the court in which the action depended the sums decerned for or the amount of the debt or demand, and expenses as aforesaid, when no decree has yet been pronounced; and a certificate in the form in the said schedule, given by the sheriff-clerk of the county in which such arrestment shall have been used, of a bond or enactment of caution to the extent of the debt or demand, and expenses having been lodged with him, or of consignment as above provided, having been made in his hands, shall operate as a warrant for loosing any arrestment used either in that or in any other county on the dependence of the same action, without any other caution being found or any other consignment being made by the defender.

9. [*Rendering arrestments effectual.*].—And be it enacted that any person entitled to pursue an action of forthcoming where the sum or demand sought to be recovered under the forthcoming shall not exceed the value of eight pounds six shillings and eightpence sterling, exclusive of expenses and fees of extract, who shall choose to have the same heard and determined according to the summary mode provided by this Act, shall proceed by summons or complaint agreeably to the form in schedule (D) annexed to this Act, concluding for payment of the sum for which arrestment has been used, or for delivery of the goods and effects arrested, which summons or complaint, being signed by the sheriff-clerk of the county in which the arrestee resides, shall be a sufficient warrant and authority to any sheriff's officer for summoning the arrestee and the common debtor to appear and answer at a Sheriff-court of the county in which the arrestee resides, the same not being sooner than the sixth day after the date of citation, and also for summoning witnesses and havers for all parties; and, in the event of the common debtor not residing and not being found within the county in which such action of forthcoming shall be brought

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he may be cited by any sheriff's officer in any other county on the said warrant, the same being first presented to and indorsed by the sheriff-clerk of such other county, who is hereby required to indorse the same on payment of the fee hereinafter mentioned, to appear at a Sheriff-court in the county in which the arrestee resides, the same not being sooner in such case than on the twelfth day after the date of citation : Provided always that the arrestee and the common debtor shall be cited to appear on the same court-day, and that a copy of the said summons or complaint, with the citation annexed thereto, shall be duly served by the officer, all in the same manner as hereinbefore provided in other causes and prosecutions under authority of this Act ; but always allowing to a party cited to appear in the Sheriff-court of a different county from that in which the citation shall be given double the time required by this Act to be allowed to a party cited to appear in the Sheriff-court of the county within which the citation shall be given : Provided also that the pursuer of such action of forthcoming shall not by such action be held to have restricted the amount of the debt due by the common debtor.

10. [*Actions of multiplepoinding.*].—And be it enacted that where any person shall hold a fund or subject which shall not exceed the value of eight pounds six shillings and eightpence, which shall be claimed by more than one party under arrestments or otherwise, it shall be competent to raise a summons of multiplepoinding in the Small Debt Court, established or to be established under this Act, to the jurisdiction of which the holder of the fund or subject shall be amenable, which summons and procedure thereon shall be agreeable to the form in schedule (E) annexed to this Act, and the claimants and common debtors, and also the holder of the fund or subject, if the process be raised in his name by any other party interested, shall be cited in manner directed to be followed in actions of forthcoming raised under this Act, and it shall be competent to the Sheriff, when he shall see cause, to order such further intimation or publication of the multiplepoinding as he may think proper, by advertisement in any newspaper or otherwise ; but no judgment preferring any party to the fund or subject *in medio* shall be pronounced at the first calling of the cause, or until due intimation has been given, such as may appear satisfactory to the Sheriff, in order that all parties may have an opportunity of lodging their claims on the fund or subject *in medio* and such claims shall be prepared agreeably to the form in schedule (E) ; and the Sheriff shall hear, try, and determine the cause as nearly as may be in the summary form provided by this Act.

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11. [*Counter claims.*].—And be it enacted that where any defender intends to plead any counter account or claim against the debt, demand, or penalty pursued for, the defender shall serve a copy of such counter account or claim by an officer on the pursuer, in the form set forth in schedule (A) hereunto annexed, or to the like effect, at least one free day before the day of appearance, otherwise the same shall not be heard or allowed to be pleaded, except with the pursuer's consent, but action shall be reserved for the same.

12. [*Compelling attendance of witnesses.*].—And be it enacted that every officer to whom any warrant as aforesaid for citing witnesses and havers shall be intrusted shall cite such witnesses or havers as any party shall require; and all such warrants shall have the same force and effect in any other county as in the county where they are originally issued, the same being first presented to and indorsed by the sheriff-clerk of such other county, who is hereby required to indorse the same on payment of the fee hereinafter mentioned; and if any witness or haver, duly cited on a citation of at least forty-eight hours, shall fail to appear, he shall forfeit and pay a penalty not exceeding forty shillings, unless a reasonable excuse be offered and sustained; and every such penalty shall be paid to the party citing the witness or haver, and shall be recovered in the same manner as other penalties under this Act, without prejudice always to letters of second diligence for compelling witnesses and havers to attend, as at present competent; and it shall be competent to the Sheriff of any county where a witness or haver resides who has failed to comply with the citations originally issued, to grant letters of second diligence for compelling the attendance of such witnesses or havers, and it shall be no objection to any witness that such witness has appeared without citation or without having been regularly cited.

13. [*Hearing and judgment. Arrestment.*].—And be it enacted that when the parties shall appear the Sheriff shall hear them *viva voce*, and examine witnesses or havers upon oath, and may also examine the parties, and may put them or any of them upon oath in case of oath in supplement being required or of a reference being made, and, if he should see cause, may remit to persons of skill to report, or to any person competent to take and report in writing the evidence of witnesses or havers who may be unable to attend, upon special cause shown, and such cause shall in all cases be entered in the book of causes kept by the sheriff-clerk, due notice of the examination being given to both parties, and thereupon the Sheriff may pronounce judgment; and the decree, stating the amount of the expenses (if any)

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found due to any party (which may include personal charges, if the Sheriff think fit), and containing warrant for arrestment, and for poinding and imprisonment when competent, shall be annexed to the summons or complaint, and on the same paper with it, agreeably to the form in schedule (A) annexed to this Act, or to the like affect; which decree and warrant, being signed by the clerk, shall be a sufficient authority for instant arrestment, and also for poinding and sale and imprisonment, where competent, after the elapse of ten free days from the date of the decree, if the party against whom it shall have been given was personally present when it was pronounced, but if he was not so present, poinding and sale and imprisonment shall only proceed after a charge of ten free days, by serving a copy of the complaint and decree on the party personally or at his dwelling place; and if any decree shall not be enforced by poinding or imprisonment within a year from the date thereof, or from a charge for payment given thereon, such decree shall not be enforced without a new charge duly given as aforesaid.

14. [*Procurators, &c., not to appear or plead, nor pleadings to be reduced to writing, without leave of court.*].—And be it enacted that no procurators, solicitors, nor any persons practising the law, shall be allowed to appear or plead for any party without leave of the court upon special cause shown, and such leave, and the cause thereof, shall in all cases be entered in the book of causes kept by the sheriff-clerk; nor shall any of the pleadings be reduced to writing or be entered upon any record, unless with leave of the court first had and obtained, in consequence of any difficulty in point of law or special circumstances of any particular case: Provided always that when the Sheriff shall order any such pleadings to be reduced to writing, every case in which such order shall be made shall thenceforth be conducted according to the ordinary forms and proceedings in civil causes and in prosecutions for statutory penalties; and shall be disposed of in all respects as if this Act had not been passed.

15. [*Parties not appearing or making sufficient excuse to be held confessed.*].—And be it enacted that any defender, who has been duly cited, failing to appear personally or by one of his family, or by such person as the Sheriff shall allow, such person not being an officer of court, shall be held confessed, and the other party shall obtain decree against him; and in like manner if the pursuer or prosecutor shall fail to appear personally or by one of his family, or by such person as the Sheriff shall allow, such person not being an officer of court, the defender shall obtain decree of absolvitor, unless in either

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case a sufficient excuse for delay shall be stated, on which account, or on account of the absence of witnesses, or any other good reason, it shall at all times be competent for the Sheriff to adjourn any case to the next or any other court-day, and to ordain the parties and witnesses then to attend.

16. [*Hearing in cases of decree in absence.*].—And be it enacted that where a decree has been pronounced in absence of a defender, it shall be competent for him, upon consigning the expenses decerned for, and the further sum of ten shillings to meet further expenses, in the hands of the clerk, at any time before a charge is given, or, in the event of a charge being given, before implement of the decree has followed thereon, provided in the latter case the period from the date of the charge does not exceed three months, to obtain from the clerk a warrant signed by him sistiing execution till the next court-day, or to any subsequent court-day to which the same may be adjourned, and containing authority for citing the other party and witnesses and havers for both parties; and the clerk shall be bound to certify to the Sheriff on the next court-day every such application for hearing and sist granted; and such warrant, being duly served upon the other party personally or at his dwelling place, in the manner provided in other cases by this Act, shall be an authority for hearing the cause; and in like manner, where absolvitor has passed in absence of the pursuer or prosecutor, it shall be competent for him, at any time within one calendar month thereafter, upon consigning in the hands of the clerk the sum awarded by the Sheriff in his decree of absolvitor as the expenses for the defender and his witnesses, with the further sum of five shillings to meet further expenses, to obtain a warrant, signed by the clerk, for citing the defender and witnesses for both parties, which warrant being duly served upon the defender in the manner provided in other cases by this Act, shall be an authority for hearing the cause as hereby provided in the case of a hearing at the instance of the defender, the said sum of expenses awarded by the Sheriff, and consigned as aforesaid, being in every case paid over to the other party, unless the contrary shall be specially ordered by the court; and all such warrants for hearing shall be in force, and may be served by any sheriff-officer in any county, without indorsation or other authority than this Act.

17. [*Book of causes, &c., to be kept.*].—And be it enacted that the Sheriff-clerk shall keep a book, wherein shall be entered all causes conducted under the authority of this Act, setting forth the names and designations of the parties, and whether present or absent at the

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calling of the cause, the nature and amount of the claim and date of giving it in, the mode of citation, the leave and cause of procurators' appearance, the several deliverances or interlocutors, and the final decree, with the date thereof, which book shall be signed each court-day by the Sheriff; and the said entries by the clerk shall be according to the form in schedule (F) annexed to this Act, or with such addition as the Sheriff shall appoint; and the sheriff-clerk shall also keep a book or books containing a register or registers of all indorsations of decrees and warrants issued in other counties, and of all warrants for arrestment on the dependence, and of all loosings of arrestment, and of all reports of poindings or sequestrations and sales of goods and effects, which registers shall be open and patent at office hours to all concerned without fees; and the sheriff-clerk shall cause a copy of the roll of causes to be tried on each court-day to be exhibited to the public on a patent part of the court-house at least one hour before the time of meeting of such court, and which shall continue there during the time the court shall be sitting; and the sheriff-clerk, or an officer of court, shall audibly call the causes in such roll in their order.

18. [*Power to direct payment by instalments.*].—And be it enacted that the Sheriff may, if he think proper, direct the sum or sums found due to be paid by instalments weekly, monthly, or quarterly, according to the circumstances of the party found liable, and under such conditions or qualifications as he shall think fit to annex.

19. [*Decrees may be enforced in any other county.*].—And be it enacted that any decree obtained under this Act may be enforced where competent against the person or effects of any party in any other county as well as in the county where the decree is issued: Provided always that such decree, or an extract thereof, shall be first produced to and indorsed by the sheriff-clerk of such other county, who is hereby required to make such indorsement on payment of the fee hereinafter mentioned.

20. [*Appraisement and sale of poinded and sequestrated effects.*].—And be it enacted that the sequestration or poinding and sale shall be carried into effect by the officer in a summary way, by getting the effects sequestrated or poinded duly appraised by two persons, who may also be witnesses to the sequestration or poinding, and leaving an inventory or list thereof for the party whose effects are sequestrated or poinded, and not sooner than forty-eight hours thereafter carrying such effects to the nearest town or village, or, in case the sequestration or poinding shall take place in a town or village, to the

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cross or most public place thereof, and selling the same to the highest bidder by public roup between the hours of eleven forenoon and three afternoon, at the cross or such most public place, on previous notice of at least two hours by the crier, but reserving to the Sheriff, by such general regulation or special order in any particular case as he shall think fit, to appoint a different hour or place for the sale, or a longer or different kind of notice to be given of the time of selling; and in sequestrations and poidings the overplus of the price, if there shall be any, after payment of the sums decerned for, and the expenses, if expenses are awarded, including what is allowed by this Act for sequestration or poiding and sale, shall be returned to the owner or consigned with the sheriff-clerk if the owner cannot be found; or if the effects are not sold the same shall be delivered over at the appraised value to the creditor to the amount of the sum decerned for and expenses, if awarded, and the allowances for sequestration or poiding and sale; and a report of the proceedings in the sequestration or poiding and sale and proceeds, or of the delivery of the effects, shall in every case be made by the officer to the sheriff-clerk within eight days thereafter, agreeably to the form in schedule (G) annexed to this Act, or to the like effect; and where the Sheriff shall order a sale of goods or effects arrested, the same course of proceeding shall be adopted as is above directed in the case of poiding and sale; and no officer to whom the enforcement of decrees or warrants in cases falling under this Act may be committed shall be liable to any penalty, fine, or punishment for selling goods or effects under authority of such decrees or warrants by public auction, although such officer may not be licensed as an auctioneer, anything in any Act or Acts to the contrary notwithstanding; and if any person shall secrete or carry off or intromit with any poided or sequestrated effects in fraudem of the poiding creditors or of the landlord's hypothec, such person shall be liable to summary punishment by fine or imprisonment, as for contempt of court, either at the instance of the private party, with or without the concurrence of the procurator-fiscal, or at the instance of the procurator-fiscal, or *ex proprio motu* of the Sheriff, besides being liable otherwise as accords of law.

21. [*One witness sufficient.*].—And be it enacted that in all charges and arrestments, and executions of charges and arrestments, under this Act, one witness shall be sufficient, any law or practice to the contrary heretofore notwithstanding.

22. [*Actions for damages by riot under 3 Geo. IV., c. 33, and for recovery of assessments authorised by 9 Geo. IV., c. 39, may be deter-*

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mined by this Act.—And be it enacted that all actions of damages for compensation for loss or injury by the act or acts of any unlawful, riotous, or tumultuous assembly in *Scotland*, or of any person engaged in or making part thereof, authorised to be brought by an Act passed in the third year of the reign of his Majesty King *George* the Fourth, where the sum concluded for does not exceed eight pounds six shillings and eightpence sterling, as also all actions for recovery of assessments by virtue of an Act passed in the ninth year of his said Majesty's reign, intituled *An Act for the Preservation of the Salmon Fisheries in Scotland*, may be heard and determined in the summary way provided by this Act, and this notwithstanding the amount of such assessments shall exceed eight pounds six shillings and eightpence sterling.

23. [*Sheriffs to hold Circuit Courts for Small Debt causes.*—And whereas by an Act passed in the twentieth year of the reign of his Majesty King *George* the Second, for taking away and abolishing the heritable jurisdictions in *Scotland*, it is provided that Sheriffs may hold itinerent courts at such times and places within their respective jurisdictions as they shall judge expedient, or as shall be directed or ordered by his Majesty, his heirs and successors; and by the said recited Act of the tenth year of the reign of his Majesty King *George* the Fourth, provision is made for the necessary accommodation for holding courts for the purposes of the said Act, which the Sheriff should judge it expedient to hold at other than the usual places for holding the same: And whereas it is expedient to make better provision for holding itinerent or Circuit Courts for the purposes of this Act, be it enacted that the several Sheriffs of the several sheriffdoms in *Scotland* shall, in addition to their ordinary Small Debt Courts, by themselves or their substitutes, hold Circuit Courts, for the purposes of this Act at such of the places within each sheriffdom set forth in the schedule (H) annexed to this Act, and for such number of times within each place in each year, not exceeding the number of times mentioned in the said schedule (H) as shall be directed by warrant under her Majesty's sign manual, and to be published in the *London Gazette*, at such times as they shall deem best and most convenient to fix for the general business of the county, if there shall be any cause at such places at such times to try, but as nearly as may be at equal intervals between each court, except as hereinafter provided, and shall remain at each such place until the causes ready to be heard shall be disposed of; and each sheriff-clerk, or a depute appointed by him is hereby required to attend at such places and times

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within his sherifffdom, and to find the necessary accommodation for holding all such courts on his own charges and expenses, in respect of the fees allowed by this Act: Provided always that no sheriff-clerk shall acquire a vested right to any increased amount of fees or emoluments to be drawn under this Act, or shall be entitled to compensation in consequence of being deprived of such increased amount of fees or emoluments, or of any future regulation thereof by any Act to be hereafter passed.

24. [*Sheriffs empowered to change places and times.*].—And be it enacted that the several Sheriffs of the several sherifffdoms, with the consent and approbation of one of her Majesty's principal Secretaries of State, may from time to time change the places or number of times at which such Circuit Courts shall be directed to be held as aforesaid, or discontinue the same or any of them in any sherifffdom in which such Circuit Courts or any of them may be found unnecessary or inexpedient, or direct any two of such courts held in islands or other places where it may be deemed expedient to be held at short intervals from each other, or direct Circuit Courts to be held at such places in any sherifffdom although not mentioned in the said schedule (H), or in such additional places in counties mentioned in the said schedule, as may seem necessary and proper; and all such additional Circuit Courts shall be held in terms of the provisions and directions of this Act.

25. [*Sheriff-clerks to appoint deputies, and to give notices.*].—And be it enacted that the sheriff-clerk of each sherifffdom shall attend personally, or appoint a depute to act at each of the places at which Courts may be directed to be held in terms of this Act, and such depute shall, in the absence of the principal clerk, attend at and during the holding of such Circuit Courts, and shall thereat perform all the duties by this Act required to be performed by the sheriff-clerk; and if such depute shall not be resident in such place, the sheriff-clerk may also appoint a proper person resident in such place, or in its immediate vicinity, to issue the summonses or complaints which may be applied for and issued under the provisions of this Act, and the principal clerk shall give or cause to be given due intimation of the name, description, and residence of each person so appointed depute-clerk, and of the person appointed to issue summonses and complaints as aforesaid, by notice in the form set forth in schedule (I) hereunto annexed, and which notice, being signed by the sheriff-clerk, shall, without being stamped, be a sufficient commission to such sheriff-clerk-depute, and such notice, or a copy thereof, shall be affixed on

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or near the doors of the church of the parish within which such court is to be held, and also, if he shall see cause, by advertisement in the newspaper or newspapers of the greatest reputed circulation in the neighbourhood, and notice shall in like manner be given by the sheriff-clerk, in the form of schedule (K) hereunto annexed, of the times at which such Circuit Courts shall be fixed to be held: Provided always that no person who shall act as depute-clerk for the purposes of this Act, and for no other purposes, shall be thereby disqualified from acting as a procurator before any court, except the Small Debt Court in which he shall act as aforesaid, or from being registered or from voting under any Act or Acts of Parliament relative to the election of Members of Parliament or of magistrates of burghs.

26. [*Actions to be brought in the place of defender's domicile.*—And be it enacted that each Sheriff shall, three months before holding any Circuit Court in terms of this Act, by a minute entered in the sederunt book of his court, and published in such manner as he may think proper, and of which a printed copy shall be publicly affixed at all times on the walls of every sheriff-court-room within his sheriffdom, apportion the parishes or parts of parishes which shall, for the purposes of this Act, be within the jurisdiction of any Small Debt Court to be held within his sheriffdom as aforesaid, and thereafter from time to time alter such apportionment as the circumstances may require, and such alteration shall be published as aforesaid for at least three months before the same shall take effect, and all causes shall be brought before the ordinary Small Debt Court, or any Circuit Small Debt Court, within the jurisdiction of which the defender shall reside, or to the jurisdiction of which he shall be amenable: Provided always that if there shall be more defenders than one in one cause of action who shall be amenable to the jurisdiction of different courts, or if from any other cause the Sheriff shall be satisfied that such course shall be expedient for the ends of justice, it shall be competent to the Sheriff, upon summary application in writing made by or for any pursuer, lodged with the sheriff-clerk, or upon verbal application made by or for any pursuer in open court, to order a summons or complaint to be issued, and the cause to be brought before his ordinary Small Debt Court, or before any of his Circuit Small Debt Courts, as shall appear most convenient; and such summons or complaint shall be issued accordingly on the Sheriff writing and subscribing thereon the name of the court before which the same is to be heard.

27. [*Sheriff may adjourn causes to any of his other Small Debt Courts.*—And be it enacted that the Sheriff may, where the ends of

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justice and the convenience of the parties require it, adjourn and remove the further hearing of or procedure in any sequestration, multiplepoinding, or any other cause, from his Ordinary Small Debt Court to any of his Circuit Small Debt Courts, and from any of his Circuit Small Debt Courts to his ordinary or any other Circuit Small Debt Court, or to any diet of his Ordinary Court, to be there dealt with according to the provisions of this Act, or to any other time or place specially appointed for the purpose; and such order of adjournment and removal shall be held due notice to the parties of such adjournment and removal being made, unless further notice shall be ordered.

28. [*Sheriff of Moray may hold courts at Grantown.*].—And whereas, in the upper district of *Morayshire* which borders on the river *Spey*, there is no place in which Circuit Courts can be conveniently held, but such court could be conveniently held in the village of *Grantown*, situated in a detached part of the county of *Inverness*, in the immediate vicinity of the said district of *Morayshire*: be it therefore enacted that in case it shall be directed by one of her Majesty's Principal Secretaries of State that a Circuit Court should be established in terms of this Act for the upper district of *Morayshire*, it shall be competent to the Sheriff of *Morayshire*, or his substitutes, to grant warrants and to hold courts for the trial of all causes competent under this Act, and to pronounce judgment therein, within the said village of *Grantown*, in the same way and to the same effect in all respects as if such courts were held and warrants were granted and judgments pronounced within the said county of *Moray*; and it shall also be competent to the sheriff-clerk and officers of *Morayshire* to issue summonses and perform other duties authorised by this Act within the village of *Grantown* in like manner as within the county of *Moray*.

29. [*Sheriff and sheriff-clerk's expenses at Circuit Courts.*].—And be it enacted that an account of the travelling and other charges incurred by the Sheriff and sheriff-clerks in going to, living at, and returning from the places where such Circuit Courts shall be held as aforesaid, shall be rendered annually in Exchequer with the other charges of the Sheriffs, and such accounts, being there audited, shall be allowed to an amount, for the Sheriff not exceeding five pounds, and for the sheriff-clerk not exceeding one pound ten shillings for each court, and paid out of the public revenue of *Scotland* as the charges of the Sheriffs are in use to be paid.

30. [*Decree not subject to review, except as hereby provided.*].—And be it enacted that no decree given by any Sheriff in any cause or prosecution decided under the authority of this Act shall be subject to

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reduction, advocacy, suspension, or appeal, or any other form of review or stay of execution, other than provided by this Act, either on account of any omission or irregularity or informality in the citation or proceedings, or on the merits, or on any ground or reason whatever.

31. [*Form of review provided.*].—And be it enacted that it shall be competent to any person conceiving himself aggrieved by any decree given by any Sheriff in any cause or prosecution raised under the authority of this Act to bring the case by appeal before the next Circuit Court of Justiciary, or, where there are no Circuit Courts, before the High Court of Justiciary at *Edinburgh*, in the manner, and by and under the rules, limitations, conditions, and restrictions contained in the before-recited Act passed in the twentieth year of the reign of his Majesty King *George* the Second, for taking away and abolishing the heritable jurisdictions in *Scotland*, except in so far as altered by this Act: Provided always that such appeal shall be competent only when founded on the ground of corruption or malice and oppression on the part of the Sheriff, or on such deviations in point of form from the statutory enactments as the Court shall think took place wilfully, or have prevented substantial justice from having been done, or on incompetency, including defect of jurisdiction of the Sheriff; provided also that such appeals shall be heard and determined in open Court, and that it shall be competent to the Court to correct such deviation in point of form, or to remit the cause to the Sheriff with instructions or for rehearing generally, and it shall not be competent to produce or found upon any document as evidence on the merits of the original cause which was not produced to the Sheriff when the case is heard, and to which his signature or initials have not been then affixed, which he is only to do if required, nor to found upon nor refer to the testimony of any witness not examined before the Sheriff, and whose name is not written by him when the case is heard upon the record copy of the summons, which he is to do when specially required to that effect: Provided further that no sist or stay of the process and decree, and no certificate of appeal shall be issued by the sheriff-clerk, except upon consignment of the whole sum, if any, decerned for by the decree and expenses, if any, and security found for the whole expenses which may be incurred and found due under the appeal.*

32. [*Fees to be taken.*].—And be it enacted that the following and

* The provisions of the Heritable Jurisdiction Act as to appeals will be found in Part VI. of the Appendix.

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no other or higher fees or dues of consignation shall be allowed to be taken for any matters done in any cause or prosecution raised under the authority of this Act :—

Clerk's fees in causes under this Act.

Summons, including precept of arrestment, One shilling.

Each copy for service, Sixpence.

Entering in procedure book, Sixpence.

Renewed warrant to arrest on dependence, and entering in book
One shilling.

Certificate loosing arrestment, One shilling.

Bond of caution, One shilling and sixpence.

Second diligence for compelling witnesses or havers to attend, One
shilling.

Decree, including extract, if demanded, One shilling.

Hearing, after decree in absence, One shilling and sixpence.

Indorsation of decree or warrant, and entering in book, One
shilling.

Receiving report of sequestration and appraisement, and entering
in book, One shilling.

Receiving report of sale under sequestration, and entering, One
shilling.

Receiving report of poinding and sale, and entering, One shilling
and sixpence.

Officer's fees, including assistants.

Citation of a party or intimation of counter claim, and execution of
citation given personally, One shilling.

Ditto, ditto, if citation not given personally, Sixpence.

Citation of a witness or haver, Sixpence.

Charging on decree, and returning execution of charge, One shilling.

Arrestment, and returning execution thereof, Sixpence.

Intimation of loosing arrestment, and execution thereof, Sixpence.

Poinding or sequestration and inventory, Two shillings and six-
pence.

Sale and report, Two shillings and sixpence.

Officer's travelling expenses, for each complete mile from the Cross
or Tron or other usual place of measurement in the town or
place where the Court is held, where there is any such, or if
there be none such, then from the Court-house of such town
or place to the place of execution or service, the distance tra-

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velled in returning after execution of the duty not to be reckoned, Sixpence.

Assistants, each *per* mile, in the same manner, Fourpence.

Crier's fee.

For calling each cause, One penny, payable when summons is issued.

33. [*Table of fees to be printed and hung up.*].—And be it enacted that an exact copy of the immediately preceding section of this Act shall be printed on each summons or complaint, and on each service copy thereof, and shall also be at all times hung up in every sheriff-clerk's office, and in every Sheriff-court place during the holding of any Sheriff's Small Debt Court; and any sheriff-clerk from whose office any summons or service copy thereof shall be issued not having such copy of the said section printed thereon, or at any time omitting to have such copy hung up in his office, or in the Sheriff-court place as aforesaid, or not causing the roll of causes each court-day to be publicly exhibited, or not causing the number and names of the parties in such roll to be called in their order as aforesaid, except with leave of the Sheriff upon cause shown in open court, shall be liable in a penalty not exceeding forty shillings, to be recovered at the instance of any person who shall prosecute for the same, and to be disposed of as the Sheriff shall direct.

34. [*Officers neglecting duty to be fined.*].—And be it enacted that all or any of the cases above mentioned, where any decree or warrant shall have been indorsed as aforesaid, the Sheriff's officer of the county where such decree or warrant has been originally issued, as well as of any county wherein the same is indorsed, are hereby authorised and required to obey and enforce such decree or warrant within such other county; and any sheriff's-officer failing to report any sequestration or pouding and sale as above directed, or violating or neglecting any other duty intrusted to him under this Act, or wilfully acting contrary to any provision thereof, shall be liable in a penalty not exceeding forty shillings, to be recovered at the instance of any person aggrieved thereby, and to be disposed of as the Sheriff shall direct, reserving always all further claim of damages otherwise competent against any such officer, and without prejudice to the Sheriff's lawful authority to remove and punish all officers of his court for misbehaviour or malversation in office.

35. [*Privileged persons not exempt.*].—And be it enacted that no person whatsoever shall be exempt from the jurisdiction of the Sheriff in any cause or prosecution raised under the authority of this Act on

Small Debt Act, 1837.

account of privilege, as being a member of the College of Justice, or otherwise.

36. [*Courts may limit fees in causes not exceeding £8, 6s. 8d.*].—And be it enacted that in all causes and prosecutions wherein the debt, demand, or penalty shall not exceed the value of eight pounds six shillings and eightpence sterling, exclusive of expenses and fees of extract, which shall in future be brought or carried on before any court not according to the summary form herein provided, it shall be lawful for the judge in such court notwithstanding to allow no other or higher fees or expenses to be taken or paid than those above mentioned.

37. [*Meaning of words in this Act.*].—And be it enacted that in all cases in this Act, or in the schedules hereto annexed, the word “Sheriff” shall be held to include Sheriff-depute and Steward-depute, and Sheriff-substitute and Steward-substitute; the words “Sheriff-substitute” to include Steward-substitute; the words “Sheriff-court” to include and apply to the court of the Sheriff or Steward or their substitutes; the words “sheriff-clerk” to include steward-clerk and depute-sheriff-clerk and depute-steward-clerk; the word “shire” or “county” to include stewardry; the word “sheriffdom” to include and be included in the words shire, county, or stewardry; the word “person” to extend to a partnership, body politic, corporate, or collegiate, as well as an individual; the word “landlord” to include any person having a right to exact rent, whether as owner, liferenter, heritable creditor in possession, principal tenant, or otherwise; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the plural number shall extend and be applied to one person or thing as well as several persons or things, and every word importing the masculine gender only shall extend and be applied to a female as well as a male: Provided always that those words and expressions occurring in this clause to which more than one meaning is attached shall not have the different meanings given to them by this clause in those cases in which there is anything in the subject or context repugnant to such construction.

38. [*Act may be repealed, &c.*].—And be it enacted that this Act may be repealed, altered, or amended by any Act or Acts to be passed during the present Session of Parliament.

1 Vict., c. 41.

SCHEDULES to which the foregoing Act refers.

SCHEDULE (A).

No. 1.—*Summons or Complaint in a Civil Cause.*

A B, Sheriff of the shire of _____ to
officers of Court, jointly and severally.

Whereas it is humbly complained to me by *C D* [*design him*], that *E F* [*design him*], defender, is owing the complainer the sum of [*here insert the origin of debt or ground of action, and, whenever possible, the date of the cause of action or last date in the account*], which the said defender refuses or delays to pay; and therefore the said defender ought to be decerned and ordained to make payment to the complainer, with expenses: Hereof it is my will, that on sight hereof ye lawfully summon the said defender to compare before me or my substitute in the Court-house at _____ upon the _____ day of _____ at _____ of the clock, to answer at the complainer's instance in the said matter, with certification, in case of failure, of being held as confessed; requiring you also to deliver to the defender a copy of any account pursued for, and that ye cite witnesses and have for both parties to compare at the said place and date, to give evidence in the said matter; and, in the meantime, that ye arrest in security the goods, effects, debts, and sums of money belonging to the defender as accords of law. Given under the hand of the clerk of Court at _____ the _____ day of _____
J P, Sheriff-clerk.

No. 2.—*Citation for Defender.*

E F, defender, above designed, you are hereby summoned to appear and answer before the Sheriff in the matter, and at the time and place, and under the certification set forth in the above copy of the summons or complaint against you.

This notice, _____ served upon the
day of _____ by me, _____
J T, Sheriff-officer.

No. 3.—*Execution of Citation of Defender.*

Upon the _____ day of _____ One thousand eight hundred and _____ I duly summoned the above-designed *E F*, defender, to appear and answer before the Sheriff in the matter, and at the time and place, and under the certification above set forth. This I did by leaving a full copy of the above summons or complaint, with a citation
!

Small Debt Act, 1887.

thereto annexed,* for the said defender [in his hands personally, or otherwise as the case may be].

J T, Sheriff-officer.

No. 4.—*Execution of notice of Counter Claim by defender against pursuer.*

Upon the day of I gave notice to C D, pursuer, of the above counter account [or claim] intended to be pleaded against him by E F, defender in the small debt action to which the said defender was summoned to appear before the Sheriff at upon the day of at of the clock. This I did by leaving a copy of the above account [or notice of claim, shortly explaining it], for the said pursuer [in his hands personally, or otherwise, as the case may be].

J T, Sheriff-officer.

No. 5.—*Citation for witnesses.*

M N [design him], you are hereby summoned to appear before the Sheriff of the shire of or his substitute, in the Court-house at upon the day of One thousand eight hundred and at of the clock, to bear witness for the [pursuer or defender, as the case may be], in the summons or complaint at the instance of C D [design him] against E F [design him] and that under the penalty of forty shillings if you fail to attend.

This notice served on the day of by me
J T, Sheriff-officer.

No. 6.—*Execution of citation of witnesses.*

Upon the day of One thousand eight hundred and I duly summoned M N, &c. [design them], to appear before the Sheriff of the shire of , or his substitute, in the Court-house at upon the day of One thousand eight hundred and at of the clock, to bear witness for the in the summons or complaint at the instance of C D [design him] against E F [design him]. This I did by delivering a just copy of citation, signed by me, to the said M N [personally, or otherwise as the case may be].

J T, Sheriff-officer.

No. 7.—*Decree for pursuer in a Civil Cause.*

At the day of One thousand

* If there is an account mentioned in the complaint, the officer must serve a copy of it along with a copy of the summons or complaint.

1 Vict., c. 41.

eight hundred and the Sheriff of the shire of
finds the within-designed defender, liable to the pursuer in
the sum of with of expenses, and decerns and
ordains instant execution by arrestment, and also execution to pass hereon
by poinding and sale and imprisonment, if the same be competent, after
free days.

J P, Sheriff-clerk.

No. 8.—*Summons of Complaint for statutory penalty.*

A B, Sheriff of the shire of to
officers of Court, jointly and severally.

Whereas it is humbly complained to me by C D, procurator-fiscal of
Court [or where a private party only], G H [designation], [or, where a private
party prosecutes with the concurrence of the procurator-fiscal], G H, with
concurrence of C D procurator-fiscal of Court, that E F [designation],
defender, has incurred the penalty of imposed by the Act of
Parliament [mention the Act], the said defender having [state
the offence, specifying time and place]; therefore the said defender ought to
be decerned and ordained to make payment of the said penalty, with ex-
penses [state to whom and in what proportions payable, and the term of im-
prisonment where the same is the mode of recovery]: Herefore it is my will,
that on sight hereof ye lawfully summon the said defender to compare
before me or my substitute in the Court-house at upon the
day of at of the clock, to answer at
the complainer's instance in the said matter, with certification, in case of
failure, of being held as confessed; and that ye cite witnesses and havers
for both parties to compare at the same place and date to give evidence
in the said matter. Given under the hand of the clerk of court at
the day of

J P, Sheriff-clerk.

Concurs C D, procurator-fiscal.

[For citation for defender and execution thereof, and citation for witnesses and
execution thereof, see Nos. 2, 3, 4, and 5 respectively].

No. 9.—*Decree for prosecutor in prosecution for penalty.*

At the day of One thousand
eight hundred and the Sheriff of the shire of
finds that the within-designed E F, defender, has incurred the penalty of
as libelled, payable to [if there is a power to
mitigate, and mitigation, add, "which is hereby mitigated to the sum of
"], and also finds the said defender liable in
of expenses to the complainer, and decerns and ordains instant execution

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by arrestment, and also execution by poinding and sale and imprisonment, if the same be competent [*stating the term of imprisonment where it is fixed*], after free days.

J P, Sheriff-clerk.

No. 10.—*Decree of Absolvitor, with expenses.*

[*The following will answer either for civil causes or prosecutions for penalties.*]

At the day of One thousand eight hundred and the Sheriff of the shire of assoilzies the within-designed *E F*, defender, from the within complaint, and finds the within-designed *C D*, pursuer, liable to him in the sum of of expenses, and decerns and ordains instant execution by arrestment, and also execution to pass hereon by poinding and sale after free days.*

J P, Sheriff-clerk.

No. 11.—*Charge on Decree.*

E F, above-designed, you are hereby charged to implement the decree of which, and of the complaint whereon the same proceeded, the above is a copy, within days from this date, under pain of poinding and sale without further notice. This charge given by me, on the day of before *O P* [*design him*].

J T, Sheriff-officer.

No. 12.—*Execution of Charge.*

[*To be on the same paper with the complaint and decree.*]

On the day of One thousand eight hundred and I duly charged *E F*, above-designed, to implement the above decree within the time and under the pains therein expressed. This I did by delivering a just copy of the foregoing complaint and decree, and a charge thereto annexed subscribed by me, to the said *E F* [*personally, or as the case may be*], before *O P* [*design him*], witness hereto, with me subscribing.

J T, Sheriff-officer.

O P, witness.

* Where the pursuer does not return the original summons, the above decree may be written on the copy served on the defender.

 1 Vict., c. 41.

SCHEDULE (B).

Summons of Sequestration and Sale at the instance of a landlord.

A B, Sheriff of the shire of _____ to officers of court,
jointly and severally.

Whereas it is humbly complained to me by *C D*, pursuer [*design him*], that *E F*, defender [*design him*], is owing to the pursuer the sum of _____, being the rent for [*describe the premises*], possessed by him from _____ to _____ [*if any partial payments have been made, let them be here stated*], and which rent [*or balance of rent, as the case may be*] the said defender refuses or delays to pay: Therefore warrant ought forthwith to be granted to inventory, appraise, sequestrate, and, if need be, secure the goods and effects upon or within the said premises, and decree ought to be pronounced decerning the defender to make payment of the said rent [*or balance of rent, as the case may be*] to the pursuer, with expenses, and warrant ought also to be granted to sell the goods and effects sequestered in payment of the said rent [*or balance of rent, as the case may be*] and expenses: Herefore it is my will, that on sight hereof ye lawfully summon the said defender to compare before me or my substitute, within the Court-house of _____ upon the _____ day of _____ at _____ of the clock, to answer at the pursuer's instance in the said matter, with certification, in case of failure, of being held as confessed, and decree and warrant pronounced as craved: And my will further is, that ye forthwith inventory, sequestrate, and, if need be, secure the goods and effects upon or within the said premises until the further orders of court, or until the said defender shall make payment to the pursuer of the amount of the rents pursued for, with the expenses, or shall consign in the hands of the clerk of court the amount of the rents pursued for, with two pounds sterling to cover expenses; and that ye cite witnesses and havers for both parties to compare at the said place and date, to give evidence in the said matter. Given under the hand of the clerk of court at _____ the _____ day of _____

J P, Sheriff-clerk.

[*After hearing the cause, the decree and procedure in the sequestration and sale will be similar to the forms in ordinary causes, the words "sequestration" and "sequestered" being introduced when necessary, instead of "poinding" and "poinded."*]

SCHEDULE (C).

Arrestment on the dependence of an action.

By virtue of a warrant of the Sheriff of the shire of _____,
given under the hand of the clerk of court at _____

on

1 Vict., c. 41.

shire of _____ for *E F* [*design him*], common debtor,
against whom arrestment was used at the instance of *C D* [*design him*].
in the hands of *K L* [*design him*], on the _____ day of _____
in virtue of [*describe the warrant*], dated the _____
day of _____, that the sums of money, goods and effects owing
or belonging to the said common debtor arrested as aforesaid shall be
made forthcoming as accords of law.

G H.

Certificate for loosing arrestment used on the dependence of an action.

Whereas arrestment was used on the dependence of an action at the
instance of *C D* [*design him*], against *E F* [*design him*], in the hands of
K L [*design him, or as the case may be*], on the _____ day of _____
, by virtue of a warrant of the Sheriff of the shire of _____
given under the hand of the clerk of court at _____
the _____ day of _____: And whereas the said *E F*
has now made sufficient consignment in the hands of the sheriff-clerk of
[*or, if caution has been found, say*] has found sufficient caution
acted in the Sheriff-court books of _____ by *G H* [*design*
him], his cautioner, [*here state the nature of the caution*], in order to the
loosing of the said arrestment, warrant for loosing the said arrestment is
hereby granted accordingly. Given under the hand of the clerk of court
at _____ the _____ day of _____
J P, Sheriff-clerk.

Intimation of loosing arrestment.

[*To be on the same paper with a copy of the foregoing warrant.*]

K L [*design him*], take notice, that by virtue of the warrant, whereof
the above is a copy, of the arrestment on the dependence of the action
above mentioned, used in your hands at the instance of the foresaid *C D*
against the foresaid *E F*, is loosed and taken off. This notice served on
the _____ day of _____ by me,
J T, Sheriff-officer.

Execution of intimation of loosing arrestment.

[*To be on the same paper with the original warrant for loosing the
arrestment.*]

Upon the _____ day of _____, One thousand eight
hundred and _____ I duly intimated the above warrant to *K L*
[*design him*], arrestee. This I did by leaving a full copy thereof and in-
timation thereon, subscribed by me, for him [in his hands personally, or
as the case may be].

J T, Sheriff-officer.

Small Debt Act, 1837.

SCHEDULE (D).

Summons of Complaint in cases of Forthcoming.

A B Sheriff of the shire of _____ to _____ officers
of court, jointly and severally.

Whereas it is humbly complained to me by *C D* [designation], upon and against *K L* [designation], arrestee, and *E F* [designation], common debtor, that the said common debtor is owing the complainer the sum of _____ contained in [describe shortly the decret, or bill, or bond et cætera, by which the debt is constituted], and that the complainer on the _____ day of _____ years, in virtue of a warrant by _____ dated the _____ day of _____ arrested in the hands of the arrestee [here insert the terms of the arrestment used], which ought to be made forthcoming to the complainer: Therefore the said arrestee, and the said common debtor for his interest, ought to be decerned and ordained to make forthcoming, pay, and deliver to the complainer the money, goods, and effects arrested as aforesaid, or so much thereof as will satisfy and pay the said sum of _____ owing to the complainer as aforesaid: Herefore it is my will, that on sight hereof ye lawfully summon the said arrestee, and the said common debtor for his interest, to compare before me or my substitute in the Court-house at _____ upon the _____ day of _____ years, at _____ of the clock, to answer at the complainer's instance in the said matter, with certification in case of failure of being held as confessed; and that ye cite witnesses and havers for both parties to compare at the said place and date to give evidence in the said matter. Given under the hand of the clerk of court at _____ the _____ day of _____ years

J P, Sheriff-clerk.

[The citations and executions, and decree for the defender, with expenses, may be the same as in Schedule (A).]

Decree for the pursuer in cases of Forthcoming.

At _____ the _____ day of _____ One thousand eight hundred and _____ the Sheriff for the shire of _____ decerns and ordains the within-designed _____ arrestee, to make forthcoming, pay, and deliver to the also within-designed _____ pursuer [if the arrestee has money arrested in his hands the rest of the judgment will be the same as in ordinary cases; if there are goods and effects to be made forthcoming, the rest of the judgment will be as follows], the arrested goods and effects following; videlicet, _____, and grants warrant to sell the same, or as much thereof as will satisfy the sum of _____

1 Vict., c. 41.

and of expenses of process and the expense of sale; and failing the said arrestee making forthcoming, and delivering the said goods and effects within , then to make payment to the said pursuer of the said sum of , for recovery of which sums, the said period being elapsed without forthcoming and delivery of the said goods and effects, ordains instant execution by arrestment, and also execution to pass hereon by poinding and sale and imprisonment, if the same be competent, after free days.

J P, Sheriff-clerk.

SCHEDULE (E).

Summons of Multiplepoinding.

A B, Sheriff of the shire of to officers
of court, jointly and severally.

Whereas it is humbly shown to me by A B, pursuer [*design him*], that he is holder of [*here state the fund or subject in medio, and if necessary refer to the account thereof produced*], belonging to E F, common debtor [*design him*], which fund the pursuer is ready to pay [*or deliver*] to the said common debtor, or to whomsoever shall be found to have best right thereto, but he is distressed by claims being made thereon by the persons following, videlicet [*here state the names and designations of all the claimants, so far as known to the holder or raiser of the action*]; wherefore the said pursuer ought to be found liable only in once and single payment [*or delivery*] of the said fund or subject to whomsoever of the said parties or others interested shall be found by me to have best right thereto [*or, in the meantime, consignment ought to be ordered of the fund or subject, or sale of the subject in medio*] deducting the pursuer's expenses, and decree ought to be pronounced accordingly, and all other parties ought to be prohibited from molesting the pursuer thereanent in all time coming: Herefore it is my will, that on sight hereof ye lawfully summon the said common debtor and the said claimants [*and, in case of the action being raised by a claimant in name of the holder, it will be necessary also to summon the nominal pursuer*], to compare before me or my substitute in the Court-house of upon the day of at

of the clock, to attend to their several interests in the said matter, with certification in case of failure of being held as confessed; requiring you also to deliver to the said common debtor a copy of any account produced with the summons, and that he cite witnesses and havers for all parties to compare at the said place and date to give evidence in the said matter. Given under the hand of the clerk of the court at

the

day of

J P, Sheriff-clerk.

Small Debt Act, 1837.

Form of Claim in Multiplepounding.

I, *A B* [*design him*], hereby claim to be preferred on the fund in the multiplepounding raised in name of [*mention the raiser*], against [*mention the defenders*], for [*state the claim*] of principal due to me by [*here state generally the ground of debt, whether by bond, bill, account, &c., as the case may be*], with interest from _____, with expenses.

A B.

Form of Interlocutor of Preference.

Prefers [*here design him*], claimant for [*here specify the sum*].

[*To be signed by the Sheriff.*]

[*The citations and procedure to be as nearly as may be in the forms in other causes, and warrant to sell the subjects forming the fund in medio to be granted and carried into effect in the ordinary form.*]

SCHEDULE (F).

No.	Dates of Complaints.	Pursuers.	Defenders.	Nature and Amount.	How cited.	By what Officer.	Leave and Cause of Procurator's Appearance.	Interlocutors and Decrees.

N.B.—After the name of each pursuer and defender let the letter P or A be added, in order to mark whether the party was present or absent when the cause was called; and should the party appear by or with any other person, or a procurator, his or her name shall be marked as so appearing. Let expenses be also entered under the head of "Interlocutors."

1 Vict., c. 41.

SCHEDULE (G).

Report of Sequestration or Poinding and Sale.

[To be varied according to circumstances.]

Report of the sequestration or pouncing and sale at the instance of *C D* [design him] against *E F* [design him].

Lots.	Efforts.	Appraised at	Sold at
		£ s. d.	£ s. d.
1.	An Eight-day Clock,	4 0 0	4 10 0
2.	Six Chairs, at 6s.,	1 16 0	1 18 0
8.	One Table,	0 8 0	0 8 0
4.	One Chest of Drawers,	1 12 0	1 12 0
		7 16 0	8 8 0

Upon the _____ day of _____ One thousand
eight hundred and _____ between the hours of _____
and _____, by virtue of a decree of the Sheriff of _____
given under the hand of the clerk of court at _____ on the
_____ day of _____ at the instance of *C D*,
above designed, against *E F*, above designed, for payment of the sums of
_____, I passed with the witnesses and appraisers after named
and designed to _____, and then and there, after demanding
payment of the sums contained in the said decree past due, and payment
not being made, I pointed the effects above enumerated belonging to the
said debtor, and after making an inventory or list thereof, and getting
the same duly appraised on oath at the several values respectively above
specified in the first column, and amounting in all to [*here insert the
amount in words*], and leaving a copy of such inventory or list and ap-
praisement with the said debtor personally [*or as the case may be*], I car-
ried the said effects to the _____ of _____ [*or as the case
may be*], and there betwixt the hours of _____ and _____
and after public notice of at least _____ hours, I sold the said
effects by public roup to the highest bidder, at the prices above specified
in the second column for each lot respectively, and amounting in all to
[*here insert the amount in words*]; these things were so done before and
with *O P* and *Q R* [*design them*], witnesses and appraisers, in the premises
hereto with me subscribing.

J T, Sheriff-officer.

O P, witness and appraiser.

Q R, witness and appraiser.

Small Debt Act, 1887.

Reported to the sheriff-clerk of the shire of
 at the day of by me,
 J T, Sheriff-officer.

Note.—If the effects are not sold, the tenor of the report must be altered according to the state of the fact; for instance ["I exposed the said goods and effects to public sale, but no person having offered the appraised value, therefore I declared the same to belong to the said C D at the said respective appraised value, in payment to that amount of the sums in said decree."] In case the goods pointed, or part of them, shall sell for more than the sums in the decree, and expenses of pointing and sale, say ["I sold part of the said effects, viz., Lots 1, 2, and 3, by public roup to the highest bidder at the prices above specified in the second column for each of said lots respectively, and amounting in all to [here insert the amount in words]; and I return to the said debtor the sum of being the overplus of the price, after payment of the sum decreed for past due, and the sum of being the expenses of pointing and sale conform to the Act of Parliament; and I also return to the said debtor the effects specified in the other lots above enumerated."]

SCHEDULE (H).

COUNTIES.	PLACES AT WHICH CIRCUITS ARE TO BE HELD.
Aberdeen . . .	Inverury . . . Four Times.
	Tarland . . . Four Times.
	Turriff . . . Four Times.
	Peterhead . . . Six Times.
	Huntly . . . Four Times.
	Old Deer . . . Four Times.
Argyle . . .	Oban . . . Four Times.
	Bowmore, Island of Islay Four Times.
	Dunoon . . . Four Times.
	Lochgilthead . . . Four Times.
Ayr . . .	Saltcoats . . . Four Times.
	Largs . . . Three Times.
	Kilmarnock . . . Twelve Times.
	Beith . . . Three Times.
	Old Cumnock . . . Three Times.
	Girvan . . . Three Times.
	Maybole . . . Four Times.

1 Vict., c. 41.

COUNTIES.	PLACES AT WHICH CIRCUITS ARE TO BE HELD.										
Berwick	{ <table> <tr><td>Lauder</td><td>Three Times.</td></tr> <tr><td>Dunse</td><td>Six Times.</td></tr> <tr><td>Coldstream</td><td>Six Times.</td></tr> <tr><td>Ayton</td><td>Three Times.</td></tr> </table>	Lauder	Three Times.	Dunse	Six Times.	Coldstream	Six Times.	Ayton	Three Times.		
Lauder	Three Times.										
Dunse	Six Times.										
Coldstream	Six Times.										
Ayton	Three Times.										
Banff	{ <table> <tr><td>Cullen</td><td>Three Times.</td></tr> <tr><td>Keith</td><td>Six Times.</td></tr> <tr><td>Dufftown</td><td>Three Times.</td></tr> </table>	Cullen	Three Times.	Keith	Six Times.	Dufftown	Three Times.				
Cullen	Three Times.										
Keith	Six Times.										
Dufftown	Three Times.										
Bute	{ <table> <tr><td>Brodict, in Arran,</td><td>Four Times.</td></tr> <tr><td>Milport</td><td>Four Times.</td></tr> </table>	Brodict, in Arran,	Four Times.	Milport	Four Times.						
Brodict, in Arran,	Four Times.										
Milport	Four Times.										
Caithness	{ <table> <tr><td>Thurso</td><td>Eight Times.</td></tr> <tr><td>Lybster</td><td>Six Times.</td></tr> </table>	Thurso	Eight Times.	Lybster	Six Times.						
Thurso	Eight Times.										
Lybster	Six Times.										
Dumbarton	{ <table> <tr><td>Kirkintulloch</td><td>Four Times.</td></tr> <tr><td>Helensburgh</td><td>Four Times.</td></tr> </table>	Kirkintulloch	Four Times.	Helensburgh	Four Times.						
Kirkintulloch	Four Times.										
Helensburgh	Four Times.										
Dumfries	{ <table> <tr><td>Sanquhar</td><td>Four Times.</td></tr> <tr><td>Annan</td><td>Four Times.</td></tr> <tr><td>Langholm</td><td>Four Times.</td></tr> <tr><td>Moffat</td><td>Four Times.</td></tr> <tr><td>Lockerbie</td><td>Three Times.</td></tr> </table>	Sanquhar	Four Times.	Annan	Four Times.	Langholm	Four Times.	Moffat	Four Times.	Lockerbie	Three Times.
Sanquhar	Four Times.										
Annan	Four Times.										
Langholm	Four Times.										
Moffat	Four Times.										
Lockerbie	Three Times.										
Edinburgh	{ <table> <tr><td>Mid-Calder</td><td>Four Times.</td></tr> <tr><td>Dalkeith</td><td>Six Times.</td></tr> <tr><td>Musselburgh</td><td>Six Times.</td></tr> <tr><td>Stowe</td><td>Two Times.</td></tr> </table>	Mid-Calder	Four Times.	Dalkeith	Six Times.	Musselburgh	Six Times.	Stowe	Two Times.		
Mid-Calder	Four Times.										
Dalkeith	Six Times.										
Musselburgh	Six Times.										
Stowe	Two Times.										
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Small Debt Act, 1887.

COUNTIES.	PLACES AT WHICH CIRCUITS ARE TO BE HELD.
Inverness . . . {	Kingussie . . . Three Times. Fort Augustus . . . Three Times. Grantown . . . Three Times.
Kincardine . . . {	Laurence Kirk . . . Three Times. Bervie . . . Four Times. Durrus . . . Three Times.
Kirkcudbright . . {	New Galloway . . . Three Times. Maxwelltown . . . Four Times. Castle-Douglas . . . Four Times. Creetown . . . Three Times.
Lanark . . . {	Biggar . . . Four Times. Airdrie . . . Twelve Times. Douglas . . . Three Times.
Linlithgow . . . {	Bathgate . . . Four Times. Queensferry . . . Three Times.
Orkney . . . {	St Margaret's Hope . . . Three Times. Stromness . . . Three Times. Sanday . . . Three Times.
Shetland . . .	Burraoee . . . Two Times.
Perth . . . {	Crieff . . . Four Times. Callander . . . Four Times. Kincardine (Tullialan) . . . Four Times. Dunkeld . . . Four Times. Aberfeldy . . . Three Times. Blairgowrie . . . Four Times. Cupar-Angus . . . Four Times.
Renfrew . . . {	Lochwinnoch . . . Six Times. Pollokshaws . . . Six Times.
Ross and Cromarty . . {	Kincardine . . . Two Times. Jeantown . . . Two Times. Fortrose . . . Four Times. Invergordon . . . Four Times.
Roxburgh . . . {	Melrose . . . Four Times. Hawick . . . Six Times. Kelso . . . Six Times. Newcastleton . . . Three Times.
Selkirk . . .	Galashiels . . . Four Times.

1 Vict., c. 41.

COUNTIES.	PLACES AT WHICH CIRCUITS ARE TO BE HELD.
Stirling . . .	Drymen . . . Four Times.
	Lennox Town of Campsie . . . } Four Times.
	Balfrou . . . Four Times.
Sutherland . .	Lavig . . . Two Times.
	Tongue . . . Two Times.
	Port Gower . . Two Times.
Wigton . . .	Stranraer . . . Six Times.
	Whithorn . . . Four Times.
	Newton-Stewart . Four Times.

SCHEDULE (I).

Notice.

A B [add designation], residing _____ is the depute sheriff-clerk to whom application for summonses and everything else necessary for the Sheriff Circuit at this place for small debt causes must be made [or, in case the depute shall not be resident, say] *A B* [add designation and place of residence], is the depute-sheriff-clerk who will officiate at _____ in the Sheriff's Small Debt Circuit Court, and

D [add designation], residing at _____ is the person who will issue summonses or complaints to be brought in such court.]

(Date)

(Place)

SCHEDULE (K)

Notice.

The Sheriff will hold Circuit Courts for small debt causes at _____ of _____ on the _____ day of _____ at _____ of the clock, and on every [fix the time periodically, or if not, new notice to be given].

A B [add designation and residence] is the clerk for this place.

(Date)

(Place)

Debts Recovery Act, 1867.

PART IV.
DEBTS RECOVERY COURT.

30 & 31 Vict., c. 96.—An ACT to facilitate the Recovery of certain Debts in the Sheriff-courts in Scotland.—12th August 1867.

Whereas an Act was passed in the first year of the reign of her present Majesty, intituled *An Act for the more effectual Recovery of Small Debts in the Sheriff-courts, and for regulating the establishment of Circuit Courts for the trial of Small Debt Causes by the Sheriffs in Scotland* (7 Will. IV., & 1 Vict., c. 41); and another Act was passed in the Session of Parliament held in the sixteenth and seventeenth years of the reign of her present Majesty, intituled *An Act to facilitate procedure in the Sheriff-courts in Scotland* (16 & 17 Vict., c. 80):

And whereas it is expedient to make further provision to facilitate the recovery of certain debts in the Sheriff-courts in Scotland:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. [*Short title.*].—This Act shall be cited for all purposes as the "Debts Recovery (Scotland) Act 1867."

2. [*Causes between £12 and £50 which may be tried under this Act.*].—From and after the passing of this Act, it shall be lawful for any Sheriff in Scotland, within his sheriffdom, to hear, try, and determine in a summary way, as more particularly hereinafter mentioned, all actions of debt that may competently be brought before him for house-maills, mens' ordinaries, servants' fees, merchants' accounts, and other the like debts, wherein the debt shall exceed the value of twelve pounds sterling, exclusive of expenses and dues of extract, but shall not exceed the value of fifty pounds sterling, exclusive as aforesaid: Provided always that the pursuer shall in all cases be held to have passed from and abandoned any remaining portion of any such debt beyond the sum actually concluded for in any such action.

3. [*Proceedings to begin by summons or complaint, as in Sec. 3 of 7 Will. IV., & 1 Vict., c. 41.*].—All such actions which the pursuers thereof shall choose to have heard and determined according to the summary mode hereby provided shall proceed upon summons or com-

30 & 31 Vict., c. 96.

plaint, agreeably to the form and subject to all the provisions contained in the third section of the first-recited Act and relative schedules, except as herein provided: Provided always that the summons or complaint shall not contain and shall not constitute a warrant to cite witnesses or havers.

4. [*Parties may appear by Procurators.*].—In all actions under this Act it shall be competent for the parties or any of them to appear and plead personally, or by any person *bonâ fide* employed by them in their usual business, or by a procurator of court; and, except in applications for sequestration and sale of a tenant's effects for recovery of rent, it shall be competent for agents qualified to practise before the Court of Session to act as procurators or agents before the Sheriff-court of *Edinburgh* in any cause exceeding the value of twenty-five pounds exclusive of expenses and dues of extract raised under the authority of this Act, so long as such cause is not remitted to the ordinary roll of such Sheriff-court.

5. [*Certain sections of 7 Will. IV., & 1 Vict., c. 41, incorporated with this Act.*].—The provisions contained in the third, fifth, sixth, eighth, ninth, tenth, twelfth, eighteenth, nineteenth, twenty-first, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-eighth, thirty-fourth, thirty-fifth, and thirty-sixth sections of the first-recited Act and relative schedules shall be held as incorporated in the present Act, except in so far as they may be inconsistent with any of the provisions hereof: Provided always that the foresaid section of the first-recited Act shall for the purposes of this Act be read and construed as if they expressly related to actions of the nature and value set forth in the second section of this Act, instead of to actions of the nature and value set forth in the said sections of the first-recited Act, or in the twenty-sixth section of the second-recited Act, and farther that the fifth section of the said first-recited Act shall be read and construed as if it related expressly to the recovery of rents or balances of rents exceeding twelve pounds and not exceeding fifty pounds sterling, and that the tenth section of the said Act shall be read and construed as if it related expressly to the distribution of funds or subjects exceeding the value of twelve pounds and not exceeding the value of fifty pounds sterling, and that the counter claims or claims in actions of multiplepoinding which may be made under the authority of this Act shall be of the nature and value set forth in the second section hereof, and that wherever in the foresaid sections of the said first-recited Act the words "Ordinary Small Debt Court," or "Circuit Small Debt Court," or such like words, are used, they shall, for the

Debts Recovery Act, 1867.

purposes of this Act be held to mean and include Ordinary Courts or Circuit Courts at which causes tried under the authority of this Act are or may be set down for trial: Provided also that if any person shall make a claim in any action of multiplepinding raised under the authority of this Act, or a counter claim in any other action raised under this Act, which claim or counter claim, as the case may be, is not of the nature and value set forth in the second section hereof, the Sheriff shall, if he thinks fit, remit the action to his ordinary roll: Provided farther that, notwithstanding the terms of the sixth section of the first-recited Act, arrestments laid on under the authority of this Act shall not prescribe till the expiry of three years, according to the provisions of the twenty-second section of an Act passed in the first and second years of the reign of her present Majesty, intituled *An Act to amend the Law of Scotland in matters relating to personal diligence, arrestments, and pindings*. (1 & 2 Vict., c. 114.)

6. [*Decrees in absence and their effect.*].—When the defender who has been duly cited shall fail to appear, he shall be held confessed, and the other party shall obtain decree against him; and in like manner, if the pursuer shall fail to appear, the defender shall obtain decree of absolvitor, unless in either case a sufficient excuse for delay shall be stated, on which account it shall at all times be competent for the Sheriff to adjourn any case to the next or any other court-day, and to any place at which he holds a court for the trial of causes under this Act or any other Act, and to ordain the parties then to attend: Provided always that a decree in absence (condemnator or absolvitor) obtained under this Act shall be as nearly as may be in the same form, and shall have the same force and effect, and be followed by the like execution and diligence, as a decree in absence obtained under the first-recited Act.

7. [*Hearing in cases of decree in absence.*].—The provisions contained in the sixteenth section of the first-recited Act shall be held as incorporated in the present Act: Provided always that it shall not be competent to insert in the warrant for hearing any warrant to cite witnesses and havers: Provided also that, notwithstanding the terms of the said sixteenth section, it shall be competent for the pursuer of any action under the authority of this Act, against whom decree of absolvitor has passed in absence, to apply for and obtain a warrant for hearing at any time within three calendar months thereafter, in the same manner and under the same conditions as those provided in the said sixteenth section, and such warrant for hearing shall have the like force and effect as if obtained under the said section.

30 & 31 Vict., c. 96.

8. [*If case unsuitable for summary trial, Sheriff may remit to ordinary roll ; otherwise shall hear case and give judgment.*].—Where both parties shall appear at the diet mentioned in the summons and complaint, or at any adjournment thereof, or at the diet for hearing under the immediately preceding section, the Sheriff shall inquire into the nature of the action and of the defence thereto, and shall make a short note of the pleas of parties (hereinafter called the note of pleas), which shall form part of the process ; and where it shall appear to the Sheriff that the case is of such a nature that it cannot, with due regard to the ends of justice, be disposed of according to the summary procedure provided by this Act, he may remit the same to his ordinary roll ; and the case, being so remitted, shall be proceeded with in the same manner as cases remitted under the first-recited Act from the small debt roll to the ordinary roll of the Sheriff-court are now proceeded with ; and it shall not be competent to take any objection that such case so remitted was not of the nature or value set forth in the second section hereof ; but if it shall not appear to be necessary for the ends of justice that the case should be remitted to the ordinary roll, the Sheriff shall fix a time (which shall be as early as may be) and place for proceeding to try and determine the same, and shall ordain the parties then to attend, and shall grant warrant to cite witnesses and havers (which warrant shall be signed by the sheriff-clerk and shall have the same force and effect as if it had been contained in the summons and complaint) ; and at said time and place or at some adjourned time and place (which adjournment the Sheriff shall only grant when the ends of justice require it) the Sheriff shall proceed to hear the parties *viva voce*, and examine witnesses or havers upon oath, and may also examine the parties, and may put them or any of them upon oath, and, if he should see cause, may remit to persons of skill to report, or to any person competent to take and report in writing the evidence of witnesses or havers, or the oath of any party who may be unable to attend upon special cause shown, and such cause shall in all cases be entered in the book of causes kept by the sheriff-clerk hereinafter mentioned, due notice of the examination being given to both parties, and thereupon the Sheriff may pronounce judgment, and the judgment shall, unless appealed from as after-mentioned, be as nearly as may be in the same form, and shall have the same force and effect, and be followed by the like execution and diligence, as a decree obtained under the thirteenth section of the first-recited Act.

9. [*If required, Sheriff shall take note of evidence, and pronounce*

Debts Recovery Act, 1867.

findings in law and fact.].—Unless required by either party, it shall not be necessary for the Sheriff to take any note of the evidence or of the facts admitted by the parties, but upon such requisition, which shall only be competently made before any parole evidence has been led, and not afterwards, he shall take a note of the evidence and of the facts admitted (hereinafter called the note of evidence), setting forth the witnesses examined and the testimony given by each, and the documents adduced, and any evidence, whether oral or written, tendered and rejected, with the ground of such rejection, and a note of any objections taken to the admission of evidence, whether oral or written, allowed to be received, which note of the evidence shall be forthwith lodged in process; and the sheriff-clerk shall mark the documents admitted in evidence, and also, separately, any documents tendered and rejected; and the diet of proof shall not be adjourned unless on special cause shown, which shall be set forth in the note of evidence at the time of making the adjournment: Provided always that the Sheriff shall either take such note with his own hand, or may dictate it to a clerk, or, on the motion of either of the parties, and in the meantime at the expense of the party or parties so moving (said expenses to be ultimately disposed of as expenses in the cause), to a writer skilled in shorthand writing, to which the oath *de fidei administratione officii* shall be administered; and the said shorthand writer shall afterwards write out in full the note of evidence so taken by him, and the Sheriff shall certify the same as correct, and the evidence of such witness shall be read over to him and shall be signed by him except where it shall have been taken in shorthand; and where the evidence has been recorded as above provided for the Sheriff shall pronounce and sign and date an interlocutor setting forth the separate findings in law and in fact upon which he has proceeded in giving judgment; and such interlocutor shall form part of the process, and if not appealed from, as hereinafter provided, shall be final and conclusive, and not subject to review by any court whatever; and the judgment of the Sheriff shall, at the expiry of the time allowed for appeal hereinafter mentioned, and if not appealed from during the same, be extracted, as nearly as may be, in the mode provided in thirteenth section and relative schedule of the first-recited Act, and shall have the same force and effect, and be followed by the like execution and diligence, as a decree obtained under the last-mentioned section of the said first-recited Act.

10. [*Appeal competent only when note of evidence taken.*].—Where neither party has, in the manner above provided, required the Sheriff

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to take a note of the evidence, it shall not be competent to appeal against the judgment which he shall pronounce, in so far as the findings in fact pronounced by him are concerned, and the said findings shall be final and conclusive, and not subject to review by any court whatever: Provided also that it shall not in any case be competent to appeal until judgment has been pronounced by the Sheriff finally disposing of the cause, but an appeal when taken shall have the effect of submitting to review all the previous proceedings and interlocutors.

11. [*Appeal where case heard by Sheriff-substitute.*].—Subject to the provisions contained in the immediately preceding section, where the case has been heard and the judgment has been given by the Sheriff-substitute, it shall be competent for either party to appeal against such judgment to the Sheriff; and the party who proposes to appeal against the same shall, within eight days, or in cases depending before the Sheriff of *Orkney* and *Shetland* within sixteen days, from the date of the interlocutor before mentioned, engross and sign by himself or by his procurator, under the said interlocutor, the words, “I appeal against the judgment of the Sheriff-substitute” (failing which the judgment of the Sheriff-substitute shall be, as hereinbefore provided, final and conclusive, and not subject to review by any court whatever); and it shall be competent for the appellant to subjoin to his appeal at the time of engrossing it a note of the legal authorities upon which he founds; and the sheriff-clerk shall forthwith transmit to the Sheriff the summons or complaint, the interlocutor of the Sheriff-substitute, the note of pleas, and the note of evidence, with the productions made, if any, and the Sheriff shall without delay consider the appeal, and shall affirm or alter the judgment of the Sheriff-substitute, and shall without delay pronounce such judgment as may be right, and shall set forth in an interlocutor (which he shall transmit along with the process to the sheriff-clerk) the terms of his judgment; and if he shall have altered that of the Sheriff-substitute, he shall set forth the findings in fact and law upon which he proceeded in giving judgment: Provided always that if it shall seem proper the Sheriff may order the case to be reheard, and the evidence in the cause taken of new or additional evidence therein to be taken, either before himself or before the Sheriff-substitute, or before a commissioner if otherwise competent, with such instructions as he shall deem right; and the judgment of the Sheriff shall, at the expiry of the period allowed for appeal hereinafter mentioned, and if not appealed from during the same, be extracted as nearly as may be in the same mode, and shall have

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the same force and effect, and be followed by the like execution and diligence, as a decree obtained under the thirteenth section of the first-recited Act and relative schedule.

12. [*Appeal where case heard by Sheriff-depute in first instance.*].—Subject to the provisions contained in the tenth section hereof, and where the cause exceeds the value of twenty-five pounds sterling, where the case has been heard and the judgment pronounced by the Sheriff (and not by the Sheriff-substitute) in the first instance, it shall be competent for either party to appeal against such judgment to either of the divisions of the Court of Session, and the party who proposes to appeal against such judgment shall, within eight days, or in cases depending before the Sheriff of *Orkney* and *Shetland* within sixteen days, from the date of the Sheriff's interlocutor before-mentioned, engross and sign by himself or by his procurator, under the said interlocutor, the words, "I appeal against the judgment of the Sheriff to the division of the Court of Session" (failing which the judgment of the Sheriff shall, as hereinbefore provided, be final and conclusive, and not subject to review by any court whatever); and the sheriff-clerk shall forthwith transmit to one of the principal clerks of the division to which the appeal is taken (or to one of the principal clerks of the first division if the division is not named in the appeal) the whole process; and the division shall, when the cause is brought before them as hereinafter provided, hear the appeal without any written pleadings, and shall affirm or alter the judgment of the Sheriff, and shall remit to him, or to the Sheriff-substitute, to decern accordingly, or to pronounce such other judgment as shall seem just; and such decree shall be extracted as nearly as may be in the same mode, and shall have the same force and effect, and be followed by the like execution and diligence, as a decree obtained under the thirteenth section of the first-recited Act: Provided always that, if it shall seem proper, the division may order the case to be reheard, and the evidence taken of new, or additional evidence to be taken by the Sheriff or Sheriff-substitute, with such directions as shall seem right; and the decree pronounced by the Sheriff or Sheriff-substitute upon such rehearing shall be treated in all respects as if it had been pronounced by the Sheriff or Sheriff-substitute in the first instance: Provided also that any judgment or order pronounced by the division shall be final and conclusive, and not subject to review by any court.

13. [*Appeal where case heard by Sheriff on appeal from the Sheriff-substitute.*].—Where the case has been heard by the Sheriff on appeal, and judgment pronounced by him as above provided for, it shall be

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the duty of the sheriff-clerk, immediately on receiving the Sheriff's interlocutor, to transmit a copy thereof through the post office to the parties or their procurators; and within eight days, or within the sheriffdom of *Orkney* and *Shetland* within sixteen days, after the date of such transmission, it shall be competent for either of the parties to appeal against his (the Sheriff's) judgment in the same manner, and to the same effect, and under the same limitations, as provided for in the immediately preceding section with regard to appeals from judgments of the Sheriff in the first instance.

14. [*As to printing of papers on appeal to Court of Session.*—When a process shall be transmitted by the sheriff-clerk to one of the principal clerks of either division in the Court of Session as hereinbefore provided, the clerk to whom the process is so transmitted shall engross under the appeal a certificate setting forth the date when he received the process; and the party insisting in the appeal shall, within ten days of such date, if the Court be then sitting, or on or before the third sederunt day in the next ensuing session, if the process shall be received as aforesaid during vacation or recess, apply by written note to the Lord President of the division to which the appeal has been taken, the presenting of which note he shall at the same time intimate by letter to the respondent or his known agent, craving his Lordship to move the Court to order the said appeal to the summar roll; and it shall be competent for such division, before hearing such appeal, to order the appellant to print and box such papers as shall be necessary, and to furnish such printed copies thereof to the respondent as they shall direct; and the expense of such printing shall, in the first instance, be borne by the appellant, but shall afterwards be treated as part of the general expenses of the appeal: Provided always that if the appellant shall fail to bring his appeal before the division by note as aforesaid, he shall be held to have fallen from the same, and the process shall forthwith be re-transmitted to the sheriff-clerk, and the judgment complained of shall thereupon become final, and shall be treated in all respects in like manner as if no appeal had been taken against the same.

15. [*Book of causes, &c., to be kept.*—The sheriff-clerk shall keep a book wherein shall be entered all causes conducted under the authority of this Act, setting forth the names and designations of the parties, and whether present or absent at the calling of the cause, the nature and amount of the claim and date of giving it in, the mode of citation, the several deliverances or interlocutors of the Sheriff (except those interlocutors setting forth at length the separate findings in

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law and in fact upon which any judgment of the Sheriff shall have proceeded, of which interlocutors the dates only shall be entered in the book of causes), the dates of appeal, if any, and the final decree, with the date thereof, which book shall be signed each court-day by the Sheriff; and the said entries by the clerk shall be according to the schedule (A) annexed to this Act, or with such additions as the Sheriff shall appoint; and the sheriff-clerk shall also keep a book in which he shall enter, in the form of schedule (B) annexed to this Act, every cause transmitted to the Sheriff or Sheriff-substitute in order to be advised, specifying the Sheriff to whom the same has been transmitted, the date of such transmission, the date of the cause being returned advised by the Sheriff or Sheriff-substitute, the date of intimating the Sheriff's judgment to the parties, the date of transmitting the cause or appeal to the Court of Session, the date of the cause being returned advised by the Court of Session or being returned in consequence of the appeal having fallen for want of being insisted in, and any remarks which the Sheriff may have ordered to be entered in such book relative to any such cause; and the Sheriff-clerk shall further keep a book or books containing a register or registers of all indorsations of decrees and warrants issued in other counties, and of all sequestrations and of all reports of all poidings and sales of goods and effects under sequestrations or poidings, which registers shall be open and patent at office hours to all concerned without fee; and the sheriff-clerk shall make up a roll of the causes to be tried on each court-day under this Act, separate from the roll of causes to be tried under the said recited Acts, and shall cause a copy thereof to be exhibited to the public on a patent part of the court-house at least one hour before the time of meeting of such court, and which shall continue there during the time the court shall be sitting; and the sheriff-clerk, or an officer of court, shall audibly call the causes in such roll in their order.

16. [*Appraisement and sale of poided and sequestrated effects.*]—The twentieth section of the first recited Act and relative schedule shall be held as incorporated in the present Act: Provided always that the words "poiding and sale" in said section and relative schedule shall, for the purposes of this Act, be read and construed to include poidings on which no sale has followed as well as poidings which have been followed by sale of the poided goods and effects.

17. [*Decrees, &c., not subject to review, except as hereby provided.*]—No interlocutor, judgment, order, or decree pronounced under the authority of this Act shall be subject to reduction, advocacy, sus-

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pension, or appeal, or any other form of review or stay of diligence, as herein provided, on any ground whatever.

18. [*Fees to be taken.*].—The following and no other or higher fees or dues of consignment shall be allowed to be taken for any matters done in any cause raised under the authority of this Act (except the fees of shorthand writers or of witnesses, or of reporters or commissioners appointed by the Sheriff under the eighth section hereof, which the Sheriff is hereby empowered to fix and decern for as he shall think just, and except also the expenses incurred in any appeal to the Court of Session which shall be taxed and decerned for in common form).

Sheriff-clerk's Fees.

Summons, including precept of arrestment, Two shillings.

Each copy for service, Sixpence.

Entering in procedure book, Sixpence.

Warrant to cite witnesses and havers, One shilling.

Certificate loosing arrestment, One shilling.

Bond of caution, One shilling and sixpence.

Second diligence against witnesses and havers, One shilling.

Decree, including extract, if demanded, One shilling.

Hearing after decree in absence, One shilling and sixpence.

Indorsation of decree or warrant, and entering in book, One shilling.

Receiving report of sequestration or poinding, and entering in book, One shilling.

Receiving report of sale under sequestration or poinding, and entering in book, One shilling and sixpence.

Transmitting process on appeal to Sheriff, Sixpence.

Intimating judgment of Sheriff to each pursuer or defender, Sixpence.

Transmitting process on appeal to the Court of Session, Sixpence.

Officer's Fees, including Assistants or Witnesses.

Citation of a party, or intimation of counter claim and execution, One shilling and sixpence.

Citation of a witness or haver, and execution, Ninepence.

Charging on decree, and returning execution of charge, One shilling and sixpence.

Arrestment and returning execution thereof, One shilling and sixpence.

Intimation of loosing Arrestment, and execution thereof, One Shilling and sixpence.

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Poinding, inventory, and report, including fee to appraisers serving copy and execution, Ten shillings.

Sale and report, Ten shillings.

Officer's travelling expenses, for each complete mile from the Cross or Tron, or other usual place of measurement in the town or place where the Court is held, where there is any such, or, if there be none such, then from the Court-house of such town or place to the place of execution or service, the distance travelled in returning after execution of the duty not to be reckoned, Eightpence.

Assistants, each, per mile, in the same manner, Fourpence.

Crier's Fee.

For calling each cause, One penny, payable when summons issued.

Procurator's Fees, applicable either to pursuer's or defender's procurator.

I.—Conduct of Cause.

1. On decree in absence (absolvitor or condemnator) and procuring extract thereof:—

- (1) Where the sum concluded for (exclusive of expenses and dues of extract) does not exceed twenty-five pounds, Seven shillings and sixpence.

- (2) Where the sum concluded for (exclusive of expenses and dues of extract) exceeds twenty-five pounds, Ten Shillings.

2. On decree or judgment in a contested cause (whether the same shall have been appealed to the Sheriff or not), and procuring extract thereof:—

- (1) Where the sum concluded for (exclusive of expenses and dues of extract) exceeds twelve pounds and does not exceed twenty pounds, Thirty Shillings.

- (2) Where the sum concluded for (exclusive as aforesaid) exceeds twenty pounds and does not exceed thirty pounds, Forty Shillings.

- (3) Where the sum concluded for (exclusive as aforesaid) exceeds thirty pounds, and does not exceed forty pounds, Sixty shillings.

- (4) Where the sum concluded for (exclusive as aforesaid) exceeds forty pounds and does not exceed fifty pounds, Eighty shillings.

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8. For decree in absence or in foro in an action of forthcoming, sequestration, or multiplepinding, same as in an ordinary action.

The above fees shall be exclusive of postages and actual outlays, but shall include the whole sums exigible, whether as between party and party or between client and agent, for taking instructions to prosecute or defend the action, instructing officers to cite parties or witnesses, or to arrest on the dependence, revising summons and citation and executions, precognosing witnesses, attending proofs and debates, writing and signing appeals, correspondence, and generally doing everything requisite for commencing and carrying on the action or the defence, until final judgment or decree in the Sheriff-court.

II.—Execution of Diligence.

1. Where pinding or imprisonment has followed on the decree, or where a sale has followed on a decree of sequestration, including instructing officer to arrest, charge, pind, sell, or imprison, revising his executions and reports, correspondence, receiving payment of sums in decree, and handing same over to creditor:

(1) Where the amount decerned for (exclusive of expenses and dues of extract) does not exceed twenty-five pounds, three per centum on the amount decerned for; but no fee to be less than Nine shillings.

(2) Where the amount decerned for (exclusive of expense and dues of extract) exceeds twenty-five pounds, two per centum on the amount decerned for; but no fee to be less than Fifteen shillings.

2. Where neither pinding nor sale nor imprisonment has followed, one-half of the above, both with respect to the maximum and minimum fees: Provided always that where any cause shall have been conducted, under the fourth section hereof, partly by a solicitor-at-law, and partly by a writer to the signet or solicitor before the supreme courts, the Sheriff shall determine what portion of said fees shall be payable to each of the agents or procurators who shall have been so engaged in the cause, and the Sheriff's determination shall be final.

19. [*Table of fees to be printed and hung up.*].—An exact copy of the immediately preceding section of this Act shall be at all times hung up in every sheriff-clerk's office and in every sheriff-court place during the holding of any court for the trial of causes under the authority of this Act; and any sheriff-clerk at any time omitting to have such copy hung up in his office or in the sheriff-court place as afore-

Debts Recovery Act, 1867.

said, or not causing the roll of causes each court-day to be publicly exhibited, or not causing the number and names of the parties in such roll to be called in their order as aforesaid, except with leave of the Sheriff, upon cause shown in open court, shall be liable in a penalty not exceeding forty shillings, to be recovered at the instance of any person who shall prosecute for the same, and to be disposed of as the Sheriff shall direct: Provided always that the sheriff-clerk shall be bound to account for the fees drawn by him under the authority of this Act in the same manner as he is now by law bound to account for the fees drawn by him under the authority of the first-re-cited Act, but no farther or otherwise.

20. [*Court of Session to revise table of fees.*].—The Court of Session in Scotland shall be and is hereby authorised and empowered, after due inquiry, by Act or by Acts of Sederunt, from time to time to make such alterations by way of increase or decrease as to said court shall seem needful on the fees and dues hereby authorised to be taken, or to frame a new table or tables of fees and dues that shall be allowed to be taken for matters done in contested causes raised under the authority of this Act, in place of the fees and dues hereinbefore specified; and when any such alterations or any such new table shall be made, all the provisions herein contained relative to the fees specified in section eighteen hereof shall be applicable to such altered fees or dues, or such new table of fees and dues; and the said court shall have like powers to regulate the fees payable in appeals under this Act in the Court of Session.

21. [*Interpretation of terms.*].—In all cases in this Act, or in the schedules hereto annexed, the word "Sheriff" shall be held to include Sheriff-depute and Steward-depute and Sheriff-substitute and Steward-substitute; the words "Sheriff-substitute" to include Steward-substitute; the words "Sheriff-court" to include and apply to the court of the Sheriff or Steward or their substitutes; the words "sheriff-clerk" to include steward-clerk and depute sheriff-clerk and depute steward-clerk; the word "shire" or "county" to include stewartry; the word "sheriffdom" to include and be included in the words "shire, county, or stewartry;" the word "person" to extend to a partnership, body politic, corporate, or collegiate, as well as an individual; the word "procurator" to include a Writer to the Signet or Solicitor before the Supreme Courts entitled to act as agent under the provisions of the fourth section of this Act: Provided always that those words and expressions occurring in this clause to which more than one meaning is attached shall not have the different mean-

80 & 31 Vict., c. 96.

ings given to them by this clause in those cases in which there is anything in the subject or context repugnant to such construction.

22. [*Act not to affect recited Acts.*].—Nothing contained in this Act shall in any way affect the provisions of the recited Acts or either of them in regard to any proceedings which, before the passing of this Act, might competently take place under them.

23. [*As to payment of stamp-duty upon indentures of apprenticeship to procurators.*].—Whereas by section thirty-four of an Act passed in the twenty-fourth and twenty-fifth years of her Majesty's reign, chapter ninety-one, it is provided that no deed or instrument liable to stamp-duty shall be registered unless the same is duly stamped: And whereas by section nine of an Act passed in the twenty-eighth and twenty-ninth years of her Majesty's reign, chapter eighty-five, it is provided that every indenture entered into after the passing of the said Act with the intention of qualifying an apprentice for admission as a procurator as therein mentioned shall be recorded in the Register of Probative Writs of the county where the same shall have been entered into within six months from the date fixed for the commencement of the term of apprenticeship: And whereas such an indenture as is referred to in the last-mentioned Act is liable to a stamp-duty of thirty pounds, and it is considered that the payment of so large a sum at the time of the commencement of the apprenticeship operates harshly and prejudicially: Be it enacted that the sum of two shillings and sixpence, in part of the said stamp-duty of thirty pounds, shall be paid upon the execution of any such indenture of apprenticeship, and that the same indenture, if bearing a stamp-duty of two shillings and sixpence, shall be deemed to be duly stamped for the purpose of the recording thereof in the proper Register of Probative Writs, and also for the purpose of enforcing all the obligations therein contained, and that the sum of twenty-nine pounds seventeen shillings and sixpence, being the residue of the said stamp-duty of thirty pounds, shall be paid upon the admission of the apprentice as a procurator, in addition to the stamp-duty payable in respect of such admission.

30 & 31 Vict., c. 96.

SCHEDULE (B).

TRANSMISSION BOOK TO BE KEPT BY SHERIFF-CLERKS.

Names of Cause, as [A <i>versus</i> B].	Date of Transmission to Sheriff or Substitute	If Proof led, state whether before Sheriff or Substitute or Commissioner, and its Duration.	Date of Case being returned advised.	Date of Transmission to Sheriff.	Date of Case being returned advised.	Date of Intimation of Sheriff's Judgment.	Date of Transmission to Court of Session.	Date of Case being returned from Court of Session advised or Appeal fallen from.	Remarks.*

* *Note*.—Where cases have been longer than Six days unadvised after transmission to the Sheriff, the reason to be stated in this column. Also the names of any Commissioners to whom remits have been made to take proofs.

Also whether proof taken by Sheriff's or Commissioner's own hand, or by being dictated to a clerk or a shorthand writer.

Debts Recovery Court.

RESOLUTIONS adopted at a conference between the Sheriff of Lanarkshire and the Sheriff-substitutes in Glasgow with reference to the Debts Recovery Act 1867:—

1. The cases shall be called (before the other cases) in the ordinary courts of the Sheriff-substitutes, and the "Notes of Pleas" in opposed cases taken in court. [The cases in Glasgow are now called every Monday.]

2. Should the parties come with their pleas written, the Sheriff may adopt and authenticate them by his signature, if they appear to be properly stated.

3. The pleas should be noted before any question of remit to the ordinary court can be considered.

4. In some cases the note of pleas may, of consent of parties, form the record in the ordinary court, but in the general case it will be necessary to order condescendence and defences.

5. It will be more convenient, at least in Glasgow, to "try" the cases in chambers, so that the business of the ordinary court may be as little as possible interfered with.

6. The power to take proof at large by commission has *not* been conferred. Only on special cause shown may commission be granted to examine any particular witness or haver, or take the oath of a party.

7. It is thought inexpedient, in the meantime, to employ shorthand writers in the taking of evidence, even could the services of proper parties be obtained, which is doubtful.

8. In all opposed cases there is an appeal from the Sheriff-substitute to the Sheriff; but where no "notes of evidence" have been taken, this appeal is confined to points of law.

9. There is an appeal from the Sheriff to the Court of Session in all opposed cases above £25; but this appeal, like the other, where no

"notes of evidence" have been taken, is also confined to points of law.

10. Considerable difficulty was found in solving the question how the appeal allowed on points of law, in the cases where no notes of evidence have been taken, could be given practical effect to; but the resolution ultimately came to was, that the Sheriff-substitutes should in these cases issue interlocutors containing their findings in fact and law, the same as in cases where notes of evidence have been taken; and that the provisions at the end of section 8th were to be read as more applicable to the form of the extract to be issued by the Sheriff-clerk than to the interlocutor of the Sheriff-substitute.

11. Where the Sheriff remits back to the Sheriff-substitute to take new evidence and re-hear the case, the Sheriff-substitute should of new give judgment.

12. That there are no proper provisions for sequestrations *currente termino*.

13. It is not considered expedient, in the meantime, to take up cases under the Act at the Circuit Court of Wishaw—the only existing small debt circuit in the county.

14. A form for "Book of Causes," submitted by the sheriff-clerk-deputes, and containing certain additions to the form in the schedule annexed to the Act, was approved of.

15. The summons must necessarily go out with the extract of the decree; but the other papers, such as note of pleas, note of evidence, interlocutors with findings, &c., should be retained by the clerk. Productions, however, may be borrowed up by the parties in the usual way.

PART V.

COMMISSARY COURT.

4 Geo. IV., c. 98.—An ACT for the better granting of Confirmations in Scotland.

[*Right to confirmation to transmit to representatives.*].—Whereas it is expedient that provision should be made for the better granting of confirmations in certain cases in *Scotland*: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this Act, in all cases of intestate succession, where any person or persons who, at the period of the death of the intestate, being next of kin, shall die before confirmation be expedite, the right of such next of kin shall transmit to his or her representatives, so that confirmation may or shall be granted to such representatives in the same manner as confirmation might have been granted to such next of kin immediately upon the death of such intestate.

2. [*Court to regulate caution to be found.*].—And be it further enacted that from and after the first day of January One thousand eight hundred and twenty-four, caution shall not be required to be found by executors-nominate, and in all other cases the Court granting confirmation shall fix the amount of the sum for which caution shall be found by the person or persons to whom confirmation shall be granted, not exceeding the amount confirmed.

3. [*Partial confirmations to cease.*].—And be it further enacted that from and after the first day of January One thousand eight hundred and twenty-four, every person requiring confirmation shall confirm the whole moveable estate of a deceased person known at the time, to which such person shall make oath: Provided always that it shall and may be lawful to eik to such confirmation any part of such estate that may afterwards be discovered, provided the whole of such estate so discovered shall be added upon oath as aforesaid: Provided nevertheless, that nothing herein contained shall affect or alter the provision made with respect to special assignations by an

Confirmation and Probate Act, 1858.

Act of the Scottish Parliament, made in the year One thousand six hundred and ninety, intituled *Act anent the confirmation of testaments*.

4. [*In cases of executor's creditor confirmation to be granted.*].—Provided further and be it enacted, that in the case of confirmation by executor's creditor, such confirmation may be limited to the amount of the debt and sum confirmed to which such creditor shall make oath: Provided always that notice of every application for confirmation by any executor's creditor shall be inserted in the *Edinburgh Gazette*, at least once, immediately after such application shall be made; in evidence whereof, a copy of the *gazette* in which such notice shall have been inserted shall be produced in Court before any such confirmation shall be further proceeded in.

21 & 22 Vict., c. 56.—An ACT to amend the Law relating to the Confirmation of Executors in *Scotland*, and to extend over all Parts of the United Kingdom the effect of such Confirmation, and of Grants of Probate and Administration.—23d July 1858.

Whereas it is expedient to amend the law relating to the confirmation of executors in *Scotland*, and to extend over the United Kingdom the effect of such confirmation, and of grants of probate and administration: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. [*Practice of raising edicts of executry to cease.*].—From and after the twelfth day of November One thousand eight hundred and fifty-eight, the practice of raising edicts of executry before the Commissary Courts in *Scotland*, for the decerniture of executors to deceased persons, shall cease, and it shall not be competent to any person to obtain himself decerned executor in virtue of any such edict raised subsequently to the date aforesaid.

2. *Petition to Commissary to be substituted. Form of petition as in schedule (A).*].—From and after the date aforesaid every person desirous of being decerned executor of a deceased person as disponent, next of kin, creditor, or in any other character whatsoever now competent, or of having some other person, possessed of such character, decerned executor to a deceased person, shall, instead of applying, as hereto-

21 & 22 Vict., c. 56.

fore, for an edict of executry from the commissary, present a petition to the commissary for the appointment of an executor, which petition shall be in the form as nearly as may be of the schedule (A), hereunto annexed, and shall be subscribed by the petitioner, or by his agent.

3. [*To whom petition to be presented.*].—Such petition shall be presented to the commissary of the county wherein the deceased died domiciled, and in the case of persons dying domiciled furth of *Scotland*, or without any fixed or known domicile, having personal or moveable property in *Scotland*, to the commissary of *Edinburgh*.

4. [*Mode of intimating petition.*].—Every such petition, in place of being published at the kirk-door and market-cross, as edicts of executry have been in use to be published, shall be intimated by the commissary-clerk affixing on the door of the commissary court-house, or in some conspicuous place of the court and of the office of the commissary-clerk, in such manner as the commissary may direct, a full copy of the petition, and by the Keeper of the Record of Edictal Citations at *Edinburgh* inserting in a book, to be kept by him for that purpose, the names and designations of the petitioner and of the deceased person, the place and date of his death, and the character in which the petitioner seeks to be decerned executor, which particulars the Keeper of the Record of Edictal Citations shall cause to be printed and published weekly, along with the abstracts of the petitions for general and special services, in the form of schedule B, hereunto annexed: Provided always, that to enable the Keeper of the Record of Edictal Citations to make such publication, the commissary-clerk shall transmit to him the said particulars, and to enable the commissary clerk to grant the certificate after-mentioned, the Keeper of the Record of Edictal Citations shall transmit to the commissary-clerk a copy, certified by the said keeper, of the printed and published particulars, all in such form and manner and on payment of such fees as the Court of Session by Act of Sederunt may direct.

5. [*Certificate of intimation of petition. Additional intimation of petition in certain cases.*].—The commissary-clerk, after receiving the certified copy of the printed and published particulars, shall forthwith certify on the petition that the same has been intimated and published, in terms of the provisions of this Act, in the form of schedule (C), hereunto annexed, and such certificate shall be sufficient evidence of the facts therein set forth: Provided always, that where a second petition for confirmation is presented in reference to the same personal estate, the commissary shall direct intimation of such petition to be made to the party who presented the first petition.

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6. [*Procedure on petition. Decree-dative. Proviso as to caution.*]

—On the expiration of nine days after the commissary-clerk shall have certified the intimation and publication of a petition for the appointment of an executor as aforesaid, the same may be called in Court, and an executor decerned, or other procedure may take place, according to the forms now in use in case of edicts of executry, and with the like force and effect; and decree-dative may be extracted on the expiration of three lawful days after it has been pronounced, but not sooner: Provided always that nothing herein contained shall alter or affect the law as to executors finding caution; and that bonds of caution for executors may be partly printed and partly written.

7. [*Not to affect present procedure.*].—Provided always that nothing hereinbefore contained shall alter or affect the course of procedure now in use before the commissaries in confirmations of executors-nominate.

8. [*Where inventories, &c., may be recorded. Confirmations may be granted.*].—Inventories of personal estates of deceased persons and relative testamentary writings may be given up and recorded in, and confirmations may be granted and issued by, any commissary-court to which it is competent to apply in virtue of the provisions of this Act for the appointment of an executor-dative to the deceased.

9. [*Inventory may include personal estate in any part of United Kingdom.*].—From and after the date aforesaid, it shall be competent to include in the inventory of the personal estate and effects of any person who shall have died domiciled in *Scotland* any personal estate or effects of the deceased situated in *England* or in *Ireland*, or both: Provided that the person applying for confirmation shall satisfy the commissary, and that the commissary shall, by his interlocutor, find that the deceased died domiciled in *Scotland*, which interlocutor shall be conclusive evidence of the fact of domicile: Provided also that the value of such personal estate and effects situated in *England* or *Ireland* respectively shall be separately stated in such inventory, and such inventory shall be impressed with a stamp corresponding to the entire value of the estate and effects included therein, wheresoever situated within the United Kingdom.

10. [*Form and effect of confirmations.*].—Confirmations shall be in the form or as nearly as may be in the form of schedules (D) and (E) hereunto annexed; and such confirmations shall have the same force and effect with the like writs framed in terms of the Acts of Sederunt passed on the twentieth *December* One thousand eight hundred and twenty-three, and the twenty-fifth *February* One thousand eight hundred and twenty-four, or at present in use.

21 & 22 Vict., c. 56.

11. [*Oaths before whom to be taken.*].—Oaths and affirmations on inventories of personal estates given up to be recorded in any commissary-court may be taken either before the commissary or his depute, or the commissary-clerk or his depute, or before any commissioner appointed by the commissary, or before any magistrate or justice of the peace within the United Kingdom or the colonies, or any *British* consl.

12. [*Confirmation produced in Probate Court of England, and sealed, to have the effect of probate or administration.*].—From and after the date aforesaid, when any confirmation of the executor of a person who shall in manner aforesaid be found to have died domiciled in *Scotland*, which includes, besides the personal estate situated in *Scotland*, also personal estate situated in *England*, shall be produced in the principal Court of Probate in *England*, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the commissary, finding that such deceased person died domiciled in *Scotland*, such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and effect in *England* as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate.

13. [*Confirmation produced in Probate Court of Dublin, and sealed, to have the effect of probate or administration.*].—From and after the date aforesaid, where any confirmation of the executor of a person who shall so be found to have died domiciled in *Scotland*, which includes, besides the personal estate situated in *Scotland*, also personal estate situated in *Ireland*, shall be produced in the Court of Probate in *Dublin*, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the commissary, finding that such deceased person died domiciled in *Scotland*, such confirmation shall be sealed with the seal of the said court, and returned to the person producing the same, and shall thereafter have the like force and effect in *Ireland* as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate in *Dublin*.

14. [*Probate or letters of administration produced in Commissary-court and certified, to have effect of confirmation.*].—From and after the date aforesaid, when any probate or letters of administration to be granted by the Court of Probate in *England* to the executor or administrator of a person who shall be therein, or by any note or memorandum written thereon, signed by the proper officer, stated to have died domiciled in *England*, or by the court of Probate in *Ireland*, to the executor or administrator of a person who shall in like

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manner be stated to have died domiciled in *Ireland*, shall be produced in the Commissary-court of the county of *Edinburgh*, and a copy thereof deposited with the commissary clerk of the said court, the commissary-clerk shall indorse or write on the back or face of such grant a certificate in the form as near as may be of the schedule (F) hereunto annexed; and such probate or letters of administration, being duly stamped, shall be of the like force and effect, and have the same operation in *Scotland*, as if a confirmation had been granted by the said court.*

15. [*For securing the stamp-duties, probates, &c., to be deemed granted for all the property in the United Kingdom. Inventory to include all such property.*]—In any of the aforesaid cases where the deceased person shall be stated in or upon the probate or letters of administration to have been domiciled in *England* or in *Ireland*, as the case may be, such probate or letters of administration shall, for the purpose of securing the payment of the full and proper stamp-duties, be deemed and considered to be granted for and in respect of the whole of the personal and moveable estate and effects of the deceased in the United Kingdom, within the meaning of the Act of Parliament passed in the fifty-fifth year of the reign of King *George the Third*, chapter one hundred and eighty-four, and of all other Acts of Parliament granting or relating to Stamp Duties on probates and letters of administration in *England* and *Ireland* respectively; and the affidavit required by law to be made on applying for probate or letters of administration in *England* or *Ireland* as to the value of the estate and effects of the deceased; and also where the commissary shall in manner aforesaid find that the deceased was domiciled in *Scotland*, the inventory required by law to be exhibited and recorded in the proper Commissary Court in *Scotland* before obtaining confirmation, or intermitting with or entering upon the possession or management of the personal or moveable estate or effects of the deceased in *Scotland*, shall respectively extend to and include the whole of the personal and moveable estate of the deceased person in the United Kingdom, and the value thereof; and the stamp-duties for the time being chargeable on probates and letters of administration and on inventories respectively shall be chargeable upon any probate or letters of ad-

* The "Confirmation and Probate Amendment Act, 1859" (22 Vict. c. 80), indemnifies and protects all persons, &c., making payments upon confirmations and probates under the Act of 1858, notwithstanding any defect or circumstance affecting their validity.

21 & 22 Vict., c. 56.

ministration to be granted, and any inventory to be exhibited and recorded as aforesaid respectively, for and in respect of the whole of the personal and moveable estate and effects of the deceased in the United Kingdom and the value thereof, and the said affidavit shall also separately specify the value of the said estate and effects in *Scotland*.

16. [*Provisions of former Acts to apply to the probates, letters of administration, and inventories mentioned in this Act.*].—For the purpose aforesaid, and also for granting relief where too high a stamp-duty shall have been paid on any such probate, or letters of administration, or inventory, the provisions contained in sections forty, forty-one, forty-two, and forty-three, of the said Act passed in the fifty-fifth year of his majesty King *George* the Third, relating to probates and letters of administration granted in *England*, and the like provisions in the Act passed in the fifty-sixth year of the said King, chapter fifty-six, relating to probates and letters of administration granted in *Ireland*, and the provisions contained in the Act passed in the forty-eighth year of the said King, chapter one hundred and forty-nine, relating to inventories in *Scotland*, and also all other provisions contained in the said Acts respectively, or in any other Act or Acts relating to probates and letters of administration and inventories respectively, shall apply to the probates and letters of administration to which effect is given by this Act, and to the whole of the personal and moveable estate of the deceased for or in respect of which the same shall, in pursuance of this Act, be deemed to be granted, wheresoever situate in the United Kingdom; and also to the inventories in which the whole of the personal and moveable estate of the deceased, wheresoever situate in the United Kingdom, ought, in pursuance of this Act, to be included, in as full and ample a manner as if all such provisions were herein enacted in reference to such probates, letters of administration, and inventories respectively.

17. [*Affidavit as to domicile to be made on applying for probate or administration.*].—Provided that in any case where, on applying for probate or letters of administration, it shall be required to be stated as aforesaid that the deceased was domiciled in *England* or in *Ireland*, the affidavit so as aforesaid required by law shall specify the fact according to the deponent's belief, which shall be sufficient to authorise the same to be so stated in or upon the probate or letters of administration; Provided also that any such statement, and the interlocutor of the commissary finding that the deceased was domiciled in *Scotland*, shall be evidence and have effect for the purposes of this act only.

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18. [*Acts of Sederunt to be passed for following out purposes of this Act.*—It shall be competent to the Court of Session, and they are hereby authorised and required, from time to time, to pass such Acts of Sederunt as shall be necessary and proper for regulating in all respects the proceedings under this Act before the commissary of *Edinburgh* and other commissaries in *Scotland*, and following out the purposes of this Act, and also the fees to be paid to agents before the said courts, and to the commissary clerks and other officers of court, and the expense of publication of petitions.

19. [*Former Acts of Sederunt repealed if inconsistent with this Act.*]—All former Acts, and Acts of Sederunt made in virtue thereof, so far as inconsistent with the present Act, are hereby repealed; and this Act may be amended or repealed by any Act to be passed during the present session of Parliament, and may be cited as the “Confirmation and Probate Act, 1858.”

20. [*Interpretation of terms.*]—The word “commissary” shall include commissary-depute, and the term “commissary-clerk” shall include commissary-clerk-depute.

SCHEDULES to which the foregoing Act refers.

SCHEDULE (A).

Form of a Petition for appointment of an executor to a deceased person.

Unto the honourable the Commissary of [*specify the county*], the petition of *A B* [*here name and design the petitioner*];

Humbly sheweth,

That the late *C D* [*here name and design the deceased person to whom an executor is sought to be appointed*] died at [*specify place*] on or about the [*specify date*], and had at the time of his death his ordinary or principal domicile in the county of [*specify county*, or “*furth of Scotland*,” or “*without any fixed domicile*,” or “*without any known domicile*,” as the case may be].

That the petitioner is the only son and next of kin [*or state what other relationship, character, or title the petitioner has, giving him right to apply for the appointment of executor*].

May it therefore please your Lordship to decern the petitioner executor-dative qua next of kin to the said *C D* [*or state the other character in which the petitioner claims to be appointed executor*].

According to justice, &c.

[*Signed by the Petitioner or his agent.*]

21 & 22 Vict., c. 56.

SCHEDULE (B).

Roll of Petitions for the appointment of executors in Commissary Courts in Scotland.

County.	Name and Designation of Petitioner.	Title of Petitioner.	Name and Designation of Defunct.	Place and Date of Death.
Edinburgh.	A B, Writer in Edinburgh.	Next of Kin.	C D, Merchant in Edinburgh.	No. George Street, Edinburgh, 1st January 1857.

SCHEDULE (C).

Form of Certificate by commissary-clerk of publication of a Petition for the Appointment of an Executor.

I, A B, commissary-clerk [or "commissary-clerk-depute, as the case may be] of the county of [specify county], hereby certify that this petition was intimated by affixing a copy thereof on the door of the court-house [if some other place has been directed by the commissary, specify it], on the [specify date], and by being published by the Keeper of the Record of Edictal Citations at Edinburgh, in the printed roll of petitions for the appointment of executors in the commissary courts of Scotland, printed and published on [specify date].

A B.

SCHEDULE (D).

Form of a Testament-Dative or confirmation of the executor of a person who has died without naming one.

I, A B, commissary of the county of [specify county], considering that by my decree, dated [specify date], I decerned C D executor-dative qua next-of-kin [or other character, as the case may be,] of the late E F, who died at [specify place], on [specify date], and seeing that the said C D has since given up on oath an inventory of the personal estate and effects of the said E F at the time of his death situated in Scotland [or situated in Scotland and England, or in Scotland and Ireland, or in Scotland, England, and Ireland, as the case may be,] amounting in value to pounds, which inventory has been recorded in my court books, of date [specify date], and that he has likewise found caution for his acts and intromissions as executor: therefore I, in her Majesty's name and authority, make, constitute, ordain, and confirm the said C D executor-dative qua [specify character] to the defunct, with full power to him to

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uplift, receive, administer, and dispose of the said personal estate and effects, and grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of executor-dative *qua* [*specify character*] is known to belong; providing always, that he shall render just count and reckoning for his intromissions therewith when and where the same shall be legally required.

Given under the seal of office of the commissariot [*specify county*], and signed by the clerk of the court at [*specify place*], the [*specify date*].

To be signed by the commissary-clerk or his depute, and sealed with the seal of office.

SCHEDULE (E).

Form of a Testament Testamentar or Confirmation of an Executor-Nominate.

I, *A B*, commissary of the county of [*specify county*], considering that the late *C D* died at [*specify place*], upon [*specify date*], and that by his last will [*or other writing containing the nomination of executor*], dated [*specify date*], and recorded in my court books upon [*specify date*], the said *C D* nominated and appointed *E F* to be his executor, and that the said *E F* has given up on oath an inventory of the personal estate and effects of the said *C D* at the time of his death situated in Scotland [*or situated in Scotland and England, or situated in Scotland and Ireland, or situated in Scotland, England, and Ireland, as the case may be*], amounting in value to _____ pounds, which inventory has likewise been recorded in my court books of date [*specify date*]: Therefore I, in her Majesty's name and authority, ratify, approve, and confirm the nomination of executor contained in the foresaid last will [*or other writing containing the nomination of executor*]; and I give and commit to the said *E F* full power to uplift, receive, administer, and dispose of the said personal estate and effects, grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of an executor-nominate is known to belong; providing always, that he shall render just count and reckoning for his intromissions therewith when and where the same shall be legally required.

Given under the seal of office of the commissariot of [*specify county*], and signed by the clerk of court at [*specify place*], the [*specify date*].

To be signed by the commissary-clerk or his depute, and sealed with the seal of office.

SCHEDULE (F).

I, *A B*, commissary-clerk [*or commissary-clerk-depute*] of the county

A. S. 19th March 1859.

of Edinburgh, hereby certify that this grant of probate has [or these letters of administration have] been produced in the commissary court of the said county, and that a copy thereof has been deposited with me.

ACT of SEDERUNT to regulate Proceedings before Commissaries, and the Fees of Clerks of Commissary Courts, under the Act of Parliament 21st and 22d Vict., cap. 56.—19th March 1859.

Whereas, by the Act 21 and 22 Victoria, c. 56, entitled, "An Act to amend the Law relating to the confirmation of executors in Scotland, and to extend over all parts of the United Kingdom the effects of such confirmation, and the grants of probate and administration," it is enacted, section 4, with reference to petitions for the appointment of executors, that "every such petition, in place of being published at the kirk-door and market cross, as edicts of executry have been in use to be published, shall be intimated by the commissary-clerk affixing on the door of the commissary court-house, or in some conspicuous place of the court, and of the office of the commissary-clerk, in such manner as the commissary may direct, a full copy of the petition, and by the Keeper of the Record of Edictal Citations at Edinburgh inserting in a book, to be kept by him for that purpose, the names and designations of the petitioner, and of the deceased person, the place and date of his death, and the character in which the petitioner seeks to be decerned executor, which particulars the Keeper of the Record of Edictal Citations shall cause to be printed and published weekly, along with the abstracts of the petitions for general and special services, in the form of schedule (B) hereunto annexed: Provided always, that to enable the Keeper of the Record of Edictal Citations to make such publication, the commissary-clerk shall transmit to him the said particulars, and to enable the commissary-clerk to grant the certificate after-mentioned, the Keeper of the Record of Edictal Citations shall transmit to the commissary-clerk a copy, certified by the said keeper, of the printed and published particulars, all in such form and manner and on payment of such fees as the Court of Session by Act of Sederunt may direct." And it is farther enacted, section 18, that "it shall be competent to the Court of Session, and they are hereby authorised and required from time to time to pass such Acts of Sederunt as shall be necessary and proper, for regulating in all respects the proceedings under this Act before the commissary of Edinburgh, and other commissaries in Scotland, and following out the purposes of this Act, and also the fees to be paid to agents before the said courts, and to the commissary-clerks and other officers of court, and the expense of publication of petitions,"—

Confirmation and Probate Act, 1858.

The Lords of Council and Session, in pursuance of the powers vested in them by the said Act, do hereby enact and declare—

1. That when a petition is presented to the commissary for the appointment of an executor, the commissary-clerk of Edinburgh shall transmit, in a safe and convenient manner, and the other commissary-clerks shall transmit, through the post-office, to the keeper of the record of edictal citations at Edinburgh, a note specifying the names and designations of the petitioner, and of the deceased person, the place and date of his death, and the character in which the petitioner seeks to be decerned executor; and the said note of particulars shall be framed as nearly as may be in the form of schedule (B) annexed to the said Act, and shall be dated and subscribed by the commissary-clerk.

2. That the keeper of the record of edictal citations shall transmit, through the post-office, to the commissary-clerk, a certified copy of the printed and published particulars, in the form of schedule (B) annexed to the said Act, and which copy shall be dated and subscribed by the said keeper, and the said certified abstracts shall be preserved by the commissary-clerk, and made patent to all persons desiring to see the same, on payment of the fee specified in the table hereto annexed.

3. That the copies of the abstracts of petitions for the appointment of an executor shall be printed by the keeper of the record of edictal citations, and sold to the public at such prices as may be estimated to be sufficient to pay the expense of printing the same; and the printing and sale of the said abstracts shall be subject to the same regulations those applicable to the printing and record of edictal cita-

tions, by the 22d section of the Act 1 and 2 Vict., c. 118.

4. That the certificate of intimation to be granted by the commissary-clerk, in terms of section 5 and schedule (C) of the Act, shall be dated, and date of the certificate shall regulate the time when the petition for appointment of an executor may be called in court, in terms of section 6 of the Act.

5. That when a second petition for confirmation is presented in reference to the same personal estate, intimation shall be made to the party who presented the first petition, in terms of the 5th section of the Act; and in all other respects the procedure regarding such second petition shall be the same as that directed by the Statute and this Act in regard to a first petition.

6. That when a party shall be desirous to include in the inventory of the personal estate and effects of any person who shall have died domiciled in Scotland, any personal estate or effects of the deceased situated in England or in Ireland, or both, a statement to that effect shall be made, either in the original petition for appointment of an executor, or in a separate petition to be presented to the commissary.

7. That the certificate to be granted by the commissary-clerk of the county of Edinburgh upon grants of probate and administration, in terms of section 14 and schedule (F) of the Act, shall be dated as well as subscribed by him.

8. That all copies of probates or letters of administration deposited with the commissary-clerk of the county of Edinburgh, under the

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14th section of the said Act, shall be made patent to all persons desiring to see the same, on payment of the fee specified in the table hereto annexed; and when required, the said commissary-clerk shall furnish copies or excerpts of said documents on payment of the fee specified in the said Table.

9. That the practitioners in the commissary courts shall be entitled to charge the fees contained in the table authorised by the Act of Sederunt of 10th March 1849, so far as applicable to the proceedings under the said Act of 21 and 22 Vict., c. 56.

10. That from and after the 1st day of April next, the clerks of all commissary courts shall be entitled to charge the fees specified in the

table hereto annexed, until the same shall be altered in terms of law, and no other or higher fees shall be charged by them.

11. That the said clerks and their successors in office, shall enter in a book to be kept by them for the purpose, an accurate account of the whole fees and emoluments received by them from the commencement of this act, and shall, on the 1st of April in each year, or within ten days thereafter, transmit to the Queen's Remembrancer in Exchequer an abstract of the fees and emoluments received by them for the year immediately preceding, in order that the amount of such fees and emoluments may be known.

And the Lords appoint this Act, and the relative Table of Fees, to be inserted in the Books of Sederunt, and printed and published in common form.

(Signed)

DUN. M'NEILL, *I.P.D.*

TABLE OF FEES FOR CLERKS OF COMMISSARY COURTS.

I.—*In Applications for Appointments of Executors-dative, and other Procedure, under the Act 21 and 22 Vict., c. 56 :—*

	£	s.	d.
1. For receiving, examining, and marking each petition for the appointment of an executor-dative, affixing copies thereof, framing and transmitting, free of charge, the abstract thereof to the Keeper of the Record of Edictal Citations, receiving and examining abstract published by said keeper, writing the certificate of intimation on the principal petition, including fee on the decree-dative,	0	10	0
2. And, in addition, when a second petition is presented, besides the above fees on such second petition, if the clerk shall be directed to intimate the same, for such intimation	0	2	6

II.—*Inventories, Confirmations, and other Official Business :—*

3. For receiving and examining inventories, with relative oath, and for receiving and examining testamentary writings containing appointment of executors and relative inventory and oath—

Confirmation and Probate Act, 1858.

	£	s.	d.
When the amount of the inventory is under £100	0	2	6
£100 and under 200	0	3	6
200 ... 300	0	5	0
300 ... 500	0	7	0
500 ... 700	0	8	0
700 ... 1,000	0	10	0
1,000 ... 3,000	0	12	6
3,000 ... 5,000	0	15	0
5,000 ... 10,000	1	0	0
10,000 .. 20,000	1	10	0
20,000 ... 40,000	2	0	0
40,000 and upwards	3	0	0
4. For expediting confirmations—			
a. Testaments-dative, for all the duties (besides the charge for writings, see Art. 9)	0	3	0
Eiks thereto at same rate.			
b. Testaments testamentar			
When the amount of the inventory is under £50	0	1	0
£50 and under 100	0	2	6
100 ... 200	0	4	0
200 ... 300	0	5	0
300 ... 500	0	7	0
500 ... 1,000	0	10	0
1,000 ... 2,000	0	12	6
2,000 ... 3,000	0	15	0
3,000 ... 4,000	1	0	0
4,000 ... 5,000	1	5	0
5,000 ... 10,000	1	10	0
10,000 ... 20,000	2	0	0
20,000 ... 40,000	4	0	0
40,000 and upwards	5	0	0
Eiks to testaments testamentar at same rates.			
5. For making out and receiving bonds of caution—			
When the caution is under £200	0	5	0
£200 and under £500	0	7	6
500 and upwards	0	10	0
6. For restriction of caution, including the deliverance, and receiving and marking productions	0	2	6
7. For writing, viz.—			
For recording testaments, inventories, and all other matters required to be recorded; for extracts and copies from records, extracts of inventories or testaments, including certificate on certified copies, and generally for all writings, per sheet of writing or printing	0	1	6
NOTE.—Every sheet to contain 250 words: one sheet to be charged when the whole writing does not exceed 250 words, and if there be any remaining number of words after calculating the number of sheets of 250 words each, such remainder to be charged as an additional sheet.			

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	£	s.	d.
8. To the commissary-clerk of Edinburgh—			
a. For collation of English and Irish Probates, or letters of administration, per sheet of 250 words	0	0	2
b. For entering abstracts of such probates, or letters of administration in the commissary books, and granting certificate, in form of schedule (F)	0	10	6
9. For furnishing materials for and appending the Seal of Court to confirmations and other writs	0	1	0
10. Attendance at sealing repositories or other similar business (exclusive of the fee for marking the petition), per hour	0	6	8
11. For searches:—			
a. For giving inspection of any of the Records of Court, and, in Edinburgh, of any copy probate lodged with the clerk, each case, when not exceeding five years back	0	1	0
If beyond five years	0	2	6
b. For searching for a process or any particular document, when the search is made by the clerk, including certificate of search, when required. If beyond one year, and not exceeding five	0	2	6
Five years and upwards	0	5	0
12. For certificates of registration of testamentary and other documents	0	2	6
13. For each caveat	0	2	6

III.—*Judicial Business*:—

14. For receiving, and marking, and calling every summons or original petition, others than those under No. 1	0	1	0
15. For every defence, answer, and reply	0	1	0
16. For receiving and marking each set of productions, except the first	0	0	6
17. For each deposition of a witness, including attendance at proofs	0	0	9
18. For lending or receiving back process, and comparing the same with the inventory, and scoring the receipt	0	0	6
19. For diligence to cite witnesses, writing included	0	1	0
20. For second ditto do.	0	1	6
21. For arrestments and loosing of ditto, each	0	1	0
22. For caption to compel production of process	0	0	6
23. For marking intimation of sists on bills of advocacy, and sisting procedure	0	2	6
24. For each deliverance or decree, except those under Nos. 1 and 6	0	2	6
25. For edicts of curatory	0	1	0
26. For an act of curatory, per sheet	0	1	0
27. For extracts (judicial), per sheet	0	1	0

DUN. McNEILL, I.P.D.

Heritable Jurisdictions Act, 1747.

PART VI.

APPEALS TO HIGHER COURTS.

20 *Geo. II.*, c. 43.—An ACT for taking away and abolishing the Heritable Jurisdictions in that part of Great Britain called *Scotland*; and for making satisfaction to the Proprietors thereof; and for restoring such Jurisdictions to the Crown; and for making more effectual provision for the Administration of Justice throughout that part of the United Kingdom, by the King's Court and Judges there; and for obliging all persons acting as Procurators, Writers, or Agents in the Law of *Scotland* to take the Oaths; and for rendering the Union of the two Kingdoms more complete.

34. [*Persons aggrieved by sentence, &c., of the Sheriff-Court, in criminal cases, not inferring loss of life or demembration, or in civil where the sum did not exceed £12, may appeal to next Circuit Court.*] —And to the end that the jurisdiction of the Circuit Courts, in that part of Great Britain called *Scotland*, may be rendered more useful and beneficial to his Majesty's subjects in that part of the United Kingdom,—Be it further enacted, by the authority foresaid, that it shall and may be lawful to and for any party or parties, conceiving himself or themselves aggrieved by any interlocutor, decree, sentence, or judgment of the Sheriff's or Stewart's Court of any county, shire, or stewartry, or of the courts of any royal borough, or burgh of regality, or barony, or of any court of any Baron, or other heritor having such jurisdiction, as is not hereby abrogated or taken away, where such interlocutor, decree, sentence, or judgment shall be concerning matters criminal, of whatever nature or extent the same may be, except all cases which infer the loss of life or demembration, or in matters civil, where the subject matter of the suit did not exceed in value the sum of Twelve pounds sterling, to complain, and seek relief against the same, by appeal to the next circuit court of the circuit wherein such

county, shire or stewartry, royal burgh, or burgh of regality or barony, or such barony or estate shall lie, so as no such appeal be competent before a final decree, sentence, or judgment pronounced; and such appeal it shall be lawful for the party conceiving himself aggrieved to take and enter in open Court at the time of pronouncing such decree, judgment, or sentence, or at any time thereafter, within ten days, by lodging the same in the hands of the Clerk of Court [*Copy to be delivered to the respondents*], and serving the adverse party with a duplicate thereof personally, or at his dwelling-house, or his procurator or agent in the cause, and serving in like manner the inferior judge himself, in case the appeal shall contain any conclusion against him by way of censure, or reparation of damages, for alleged wilful injustice, oppression, or other malversation; and such service shall be sufficient summons to oblige the respondents to attend and answer at the next Circuit Court which shall happen to be held fifteen days at least after such service [*Circuit Court to proceed in summary way in hearing appeals, and award costs on affirmance*]; and thereupon the judge or judges at such Circuit Court shall and may proceed to cognosce, hear, and determine any such appeal or complaint, by the like rules of law and justice as the Court of Session or Court of Justiciary respectively may now cognosce and determine in suspensions of the interlocutors, decrees, sentences, or judgments of such inferior courts; but the said Circuit Court shall proceed therein in a summary way; and in case they shall find the reasons of any such appeal not to be relevant, or not instructed, or shall determine against the party so complaining or appealing, the said judge or judges shall condemn the appellant or complainer in such costs as the Court shall think proper to be paid to the other party, not exceeding the real costs *bona fide* expended by such party; and the decree, sentence, or judgment of such Circuit Court, in any of the cases aforesaid, shall be final.

36. [*Appellants to give security. Clerk of the Court answerable for the security.*].—Provided always that, wherever such appeal shall be brought, such complainer, at the same time he enters his appeal as aforesaid, shall lodge in the hands of the Clerk of Court from which the appeal is taken, a bond with sufficient cautioner for answering and abiding by the judgment of the Circuit Court, and for paying the costs, if any shall be by that Court awarded; and the Clerk of Court shall be answerable for the sufficiency of such cautioner.

37. [*Circuit Courts not able to determine appeal, to certify the same to the Session.*].—Provided always, and it is hereby enacted by the authority aforesaid, that in case such Circuit Court shall, in cog-

Heritable Jurisdictions Act, 1747.

nosing or proceeding upon such appeal, find any difficulty to arise, that by means thereof such Circuit Court cannot proceed to the determination of the same consistently with justice and the nature of the case; in any such case, and not otherwise, it shall and may be lawful to and for such Circuit Court to certify such appeal, together with the reasons of such difficulty, and the proceedings thereupon had before such Circuit Court, to the Court of Session or Court of Justiciary respectively; which Courts are hereby respectively authorised and required to proceed in and determine the same.

31 & 32 Vict., c. 100.—An ACT to amend the Procedure in the Court of Session, and the judicial arrangements in the Superior Courts of Scotland, and to make certain changes in the other Courts thereof.—31st July 1868.

VII.—APPEALS FROM INFERIOR COURTS.

64. [*Process of advocacy abolished.*].—The process of advocacy is hereby abolished.

65. [*Appeals substituted for advocacy.*].—Wherever, according to the present law and practice, it is competent to advocate to the Court of Session a judgment (final or not final, as the case may be) of any Sheriff or other inferior court or judge, it shall be competent, except as hereinafter provided, to submit such judgment to the review of the Court of Session by appeal in the manner hereinafter provided: Provided always that it shall not be necessary for the appellant to find caution for expenses before taking or prosecuting his appeal.

66. [*Form of note of appeal.*].—An appeal to the Court of Session under this Act may, when otherwise competent, be taken by a note of appeal written at the end or on the margin of the interlocutor sheet containing the judgment appealed from, or any note thereto annexed, or by a separate note of appeal lodged with the clerk of the inferior court; and such note of appeal may be in the following or similar terms:—

“The pursuer [*or* defender, *or* other party] appeals to the
“ Division of the Court of Session:”

And the said note shall specify the Division, and shall be signed by the appellant or his agent, and shall bear the date on which it is signed.

67. [*Not competent to appeal after six months from date of final*]

81 & 32 Vict., c. 100.

judgment.].—It shall not be competent to take or sign any note of appeal after the expiration of six months from the date of final judgment in any cause depending before the Sheriff or other inferior court or judge, even although such judgment has not been extracted.

68. [*Time at which interlocutors of inferior courts may be extracted.*].—A party may take an appeal within the space of twenty days after the date of the judgment of which he complains, during which period of twenty days extract shall not be competent; but on the expiration of the foresaid period, if no appeal shall have been taken, the Clerk of Court may give out the extract; it being competent, however, to take such appeal at any time within the period of six months from the date of final judgment in the cause, unless the judgment has previously been extracted or implemented.

69. [*Effect of appeals under this Act.*].—Such appeals shall be effectual to submit to the review of the Court of Session the whole interlocutors and judgments pronounced in the cause, not only at the instance of the appellant, but also at the instance of every other party appearing in the appeal, to the effect of enabling the Court to do complete justice without hindrance from the terms of any interlocutor in the cause, and without the necessity of any counter appeal; and an appellant shall not be at liberty to withdraw or abandon an appeal without leave of the Court; and an appeal may be insisted in by any party in the cause other than the appellant, in the same manner and to the like effect as if it had been taken by himself.

70. [*Notice of appeal.*].—The clerk of the inferior court shall, within two days after the date of any appeal being taken, send written notice of such appeal to the respondent or his agent: Provided that the failure to give such notice shall not invalidate the appeal; but the Court of Session may give such remedy for any disadvantage or inconvenience thereby occasioned as may in the circumstances be thought proper.

71. [*Form of bringing appeals into Court of Session.*].—Within two days after the appeal shall have been taken, the clerk of the inferior court shall transmit the process to one of the clerks of the Division of the Court to which the appeal is taken, who shall subjoin to the appeal a note of the day on which it is received; and it shall be lawful for either the appellant or the respondent at any time after the expiry of eight days from the date of such note to enrol the appeal; and when the appeal is called in the roll, it shall be competent for the Court to order the whole inferior court record, and the interlocutors *in causa* and note of appeal, and notes of the evidence and

Court of Session Act, 1868.

productions, if any, to be printed and boxed to the Court; or the Court may dispense with the printing and boxing of any portions of the same; and in case the record and other papers ordered to be printed shall not be printed and boxed by the appellant, or in case he shall not move in the appeal, it shall be lawful for the Court, on a motion by any other party in the cause, either to dismiss the appeal with expenses, and to affirm the interlocutor of the inferior court, or to grant an order authorising the party moving to print and box the record and other papers aforesaid, and to insist in the appeal as if it had been taken by himself.

72. [*Proof and judgment upon appeals.*].—The Court may, if necessary, order proof or additional proof to be taken in any appeal under this Act, such proof to be taken in the same manner as proof may be competently taken in any cause depending before the Inner-House, and shall thereafter, or without any such order (if no such proof or additional proof is necessary), give judgment on the merits of the cause according to the law truly applicable in the circumstances, although such law is not pleaded on the record; and the record may, with leave of the Court, be amended at any time, on such conditions as to the Court shall seem proper.

73. [*Appeal under sect. 40 of 6 Geo. IV., c. 120.*].—It shall be lawful by note of appeal under this Act, to remove to the Court of Session all causes originating in the inferior courts in which the claim is in amount above forty-pounds at the time and for the purpose and subject to the conditions specified in the fortieth section of the Act Sixth George the Fourth, chapter One hundred and twenty; and such causes may be remitted to the Outer-House.

74. [*Procedure in place of advocations ob contingentiam.*].—In place of advocations of actions and proceedings in inferior courts *ob contingentiam* of a process in the Court of Session, it shall be lawful for the party desiring to remove any such action or proceeding to the Court of Session to lay before the Lord Ordinary, or the Division of the Court before which such Court of Session process shall actually be at the time, a copy of the inferior court record or of such pleadings as may have been lodged, and of the interlocutors in the cause, certified by the clerk of the said inferior court, and to move for the transmission of the inferior court process to the Court of Session; and if upon consideration thereof the said Lord Ordinary or Division of the Court shall be of opinion that there is contingency between the said processes, he or they shall grant warrant to the clerk of the inferior court process for the transmission thereof; and

81 & 82 Vict., c. 100.

upon such transmission being made the said process shall thenceforth be proceeded with in all respects as if it had been advocated *ob contingentiam* to the Court of Session according to the present law and practice.

75. [*Exclusion of review in such cases.*].—The decision of the Lord Ordinary or of the Court, as the case may be, upon any such motion for transmission, shall be final at that stage; but, in the event of the application being refused, it shall be competent for either party to renew the motion at any subsequent stage of the cause.

76. [*Appeals substituted for advocations under special enactments.*].—Where, by any statute now in force, special provision is made for removing any action or proceeding in any inferior court to the Court of Session by advocation, it shall be lawful to remove any such action or proceeding to the Court of Session by appeal under this Act at the same stage of the cause, for the same purpose, and with such and the like restrictions as are provided by such statute.

77. [*Provisions for completing record in processes removed to the Court of Session by appeal.*].—Where it is necessary in any action removed to the Court of Session by appeal under this Act that a record should be made up in the Court of Session, the record shall be made up under the direction of the Division of the Inner-House in which the appeal is depending.

78. [*Exclusion of review by advocation under special enactments to imply exclusion of review by appeal.*].—Where, by any statute now in force, the right of review by advocation to the Court of Session is excluded or restricted, such exclusion or restriction of review shall be deemed and taken to apply to review by appeal under this Act.

79. [*Regulation of interim possession pending appeal to the Court of Session.*].—In all cases where the judgment of any inferior court shall be brought under the review of the Court of Session by appeal, it shall be competent for the inferior court to regulate in the meantime, on the application of either party, all matters relating to interim possession, having due regard to the manner in which the interests of the parties may be affected by the final decision of the cause; and such interim order shall not be subject to review, except by the Court at the hearing of such appeal, when the Court shall have full power to give such orders and direction in respect to interim possession as justice may require.

80. [*How far provisions of Part VII. to apply to depending actions.*].—The whole provisions of Part VII. of this Act shall, so far as possible, apply to all advocations in dependence before the Inner-

Evidence Act, 1840.

House at the commencement of this Act, and to all advocations which may, after the commencement of this Act, come before the Inner-House by report or reclaiming note from any Lord Ordinary: Provided always that the advocations depending before the Outer-House at the commencement of this Act shall be disposed of in the Outer-House according to the present law and practice.

PART VII.

EVIDENCE ACTS

3 & 4 Vict., c. 59.—An ACT for the Amendment of the Law of Evidence in Scotland.—7th August 1840.

WHEREAS the law of evidence in *Scotland* has in certain respects been found inconvenient, and inconsistent with the ends of justice, and therefore requires amendment: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same:—

[*Witnesses admissible notwithstanding relationship to party adducing them.*].—That from and after the passing of this Act it shall by the law of *Scotland* be no objection to the admissibility of any witness that he or she is the father or mother, or son or daughter, or brother or sister by consanguinity or affinity, or uncle or aunt, or nephew or niece by consanguinity, of any party adducing such witness in any action, cause, prosecution, or other judicial proceeding, civil or criminal; nor shall it be competent to any witness to decline to be examined and give evidence on the ground of any such relationship.

2. [*Examination in initialibus may be dispensed with.*].—And be it enacted, that it shall not be necessary for any judge in *Scotland*, or for any person acting as commissioner in taking evidence in any action, cause, prosecution, or other judicial proceeding, civil or criminal, depending in *Scotland*, to examine any witness in *initialibus*: Provided always that it shall nevertheless be competent for any such judge or person acting as commissioner, or the party against whom the witness shall be called, to examine any witness in *initialibus* as heretofore.

8 & 4 Vict., c. 59.

3. [*Presence in Court not to disqualify witnesses in certain cases.*]

—And be it enacted that in any trial before any judge of the Court of Session or Court of Justiciary, or before any Sheriff or Stewart in Scotland, it shall not be imperative on the Court to reject any witness against whom it is objected that he or she has, without the permission of the Court, and without the consent of the party objecting, been present in Court during all or any part of the proceedings; but it shall be competent for the Court, in its discretion, to admit the witness where it shall appear to the Court that the presence of the witness was not the consequence of culpable negligence or criminal intent, and that the witness has not been unduly instructed or influenced by what took place during his or her presence, or that injustice will not be done by his or her examination.

4. [*Examination of witnesses by the parties against whom they are produced.*].—And be it declared and enacted that in any action, cause, prosecution, or other judicial proceeding, civil or criminal, where proof shall be taken, whether by the judge or a person acting as commissioner, it shall be competent for the party against whom a witness is produced and sworn *in causâ* to examine such witness, not in cross only, but *in causâ*.

5. [*Act may be amended this Session.*].—And be it enacted that this Act may be amended or repealed by any Act to be passed in the present Session of Parliament.

15 & 16 Vict., c. 27.—An ACT to amend the Law of Evidence in Scotland.—17th June 1852.

WHEREAS it is expedient to alter and amend the law of evidence in Scotland: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows, viz. :—

1. [*Witnesses not to be excluded by reason of crime, &c.*].—No person adduced as a witness in Scotland before any Court or before any person having by law or by consent of parties authority to take evidence, shall be excluded from giving evidence by reason of having been convicted of or having suffered punishment for crime, or by reason of interest, or by reason of agency or of partial counsel, or by reason of having appeared without citation, or by reason of having been precognosced subsequently to the date of citation; but every

Evidence Act, 1852.

person so adduced, who is not otherwise by law disqualified from giving evidence, shall be admissible as a witness, and shall be admitted to give evidence as aforesaid, notwithstanding of any objections offered on the above-mentioned grounds :

[*Right to examine witnesses as to credibility not affected.*].—Provided always that nothing herein contained shall affect the right of any party in the action or proceeding in which such witness shall be adduced to examine him on any point tending to affect his credibility :

[*Not competent to adduce as a witness any person who shall be acting as an agent in the action.*].—Provided also that it shall not be competent to adduce as a witness in any action or proceeding any person who shall at the time when he is so adduced as a witness be acting as agent in the action or proceeding in which he is so adduced, excepting in so far as the same may be competent by the existing law and practice of *Scotland** : and

[*Where any person adduced has been an agent, no plea of confidentiality allowable.*].—Where any person who is or has been an agent shall be adduced and examined as a witness for his client, touching any matter or thing, to prove which he could not competently have been adduced and examined according to the existing law and practice of *Scotland*, it shall not be competent to the party adducing such witness to object, on the ground of confidentiality, to any question proposed to be put to such witness on matter pertinent to the issue.

2. [*Party to an action may be adduced as a witness, unless it be shewn that he has a substantial interest.*].—It shall be competent to adduce and to examine as a witness as aforesaid in any action or proceeding any party to such action or proceeding, even although individually named in the record or proceeding, unless it shall be shewn to the satisfaction of the Court, or of the person having authority to take evidence as aforesaid, that such party has a substantial interest in such action or proceeding, and is not merely nominally a party thereto.†

3. [*Witness may be examined as to having made a different statement.*].—It shall be competent to examine any witness who may be adduced in any action or proceeding as to whether he has on any specified occasion made a statement on any matter pertinent to the issue different from the evidence given by him in such action or proceeding ; and it shall be competent in the course of such action or proceeding to adduce evidence to prove that such witness has made such different statement on the occasion specified.

* See 16 & 17 Vict., c. 20, § 2 (App., p. ccxvii).

† *Ib.*, § 1.

15 & 16 Vict., c. 27.

4. [*Witness may be recalled after examination.*].—It shall be competent to the presiding judge or other person before whom any trial or proof shall proceed, on the motion of either party, to permit any witness who shall have been examined in the course of such trial or proof to be recalled.

5. [*Laws and practice inconsistent with this Act repealed.*].—All statutes, laws, and practice now in force respecting evidence in *Scotland* shall be and the same are hereby repealed, in so far as inconsistent or at variance with the provisions of this Act, but the same shall in all other respects remain in full force.

16 & 17 Vict., c. 20.—An ACT to alter and amend an Act of the fifteenth year of her present Majesty for Amending the Law of Evidence in Scotland.—9th May 1853.

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. [*Sect. 2 of 15 & 16 Vict. c. 27, repealed.*].—The second section of the Act of the fifteenth year of Her present Majesty, chapter twenty-seven, is hereby repealed.

2. [*So much of sect. 1 of 15 & 16 Vict. c. 27, as to incompetency of persons who are agents in actions being witnesses, repealed.*].—So much of the first section of the said Act as provides that “it shall not be competent to adduce as a witness in any action or proceeding any person who shall at the time when he is so adduced as a witness be acting as agent in the action or proceeding in which he is so adduced, excepting in so far as the same may be competent by the existing law and practice of *Scotland*,” is hereby repealed.

3. [*As to examination of witnesses, whether named in the record or not.*].—It shall be competent to adduce and examine as a witness in any action or proceeding in *Scotland* any party to such action or proceeding, or the husband or wife of any party, whether he or she shall be individually named in the record or proceeding or not; but nothing herein contained shall render any person, or the husband or wife of any person, who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on sum-

The Affirmations (Scotland) Act, 1865.

mary conviction, competent or compellable to give evidence for or against himself or herself, his wife or her husband, except in so far as the same may be at present competent by the law and practice of *Scotland*, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any proceeding render any husband competent or compellable to give against his wife evidence of any matter communicated by her to him during the marriage, or any wife competent or compellable to give against her husband evidence of any matter communicated by him to her during the marriage.

4. [*This Act not to apply to cases of adultery, &c.*].—Nothing herein contained shall apply to any action, suit, or proceeding instituted in *Scotland* in consequence of adultery, or for dissolving any marriage, or for breach of promise of marriage, or in any action of declarator of marriage, nullity of marriage, putting to silence, legitimacy, or bastardy, or in any action of adherence or separation.

5. [*Adducing of party as a witness not to have effect of reference to his oath.*].—The adducing of any party as a witness in any cause or proceeding by the adverse party shall not have the effect of a reference to the oath of the party so adduced: Provided always that it shall not be competent to any party who has called and examined the opposite party as a witness thereafter to refer the cause or any part of it to his oath, and that in all other respects the right of reference to oaths shall remain as at present established by the law and practice of *Scotland*.

6. [*Not to affect authority of Courts as to judicial examination.*].—Nothing herein contained shall alter or affect the authority or practice of the Courts in *Scotland* as to judicial examination.

28 & 29 Vict., c. 9.—An ACT to allow Affirmations or Declarations to be made instead of Oaths in all Civil and Criminal Proceedings in Scotland.—7th April 1865.

WHEREAS doubts have arisen whether the provisions of the eighteenth and nineteenth of Victoria, chapter twenty-five, intituled, *An Act to allow Affirmations or Declarations to be made instead of Oaths in certain Cases in Scotland*, be applicable to all Courts of Civil Judicature, and to all civil proceedings: And whereas the relief

28 & 29 Vict., c. 9.

afforded by that Act to persons refusing or being unwilling from conscientious motives to be sworn in Courts of Civil Judicature has since been extended to all Courts of Criminal Judicature, and to all criminal proceedings, by the twenty-sixth and twenty-seventh of Victoria, chapter eighty-five, and it is desirable to remove such doubts, and to make the law as to affirmations uniform for all courts and for all proceedings, whether civil or criminal: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. [*Recited Acts Repealed.*].—The said recited Acts shall be and the same are hereby repealed.

2. [*Power to persons objecting to be sworn from alleged conscientious motives to make affirmation, &c.*].—If any person called as a witness in any court of civil or criminal jurisdiction in *Scotland*, or required or desiring to make an affidavit or deposition in the course of any proceeding, or in any matter, whether civil or criminal, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the court or judge, or other presiding officer or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following:

“I, A.B., do solemnly, sincerely, and truly affirm and declare that the taking of any oath is, according to any religious belief, unlawful; and I do also solemnly, sincerely, and truly affirm and declare, &c.”

Which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form.

3. [*Persons falsely affirming, &c. to incur penalties of wilful perjury.*].—If any person making such solemn affirmation or declaration shall wilfully, falsely, and corruptly affirm or declare any matter or thing which, if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such person so offending shall incur the same penalties as by the laws and statutes of this kingdom are or may be enacted or provided against persons convicted of wilful and corrupt perjury.

4. [*Short Title.*].—This Act may be cited for all purposes as “The Affirmations (*Scotland*) Act 1865.”

Procurators (Scotland) Act. 1865.

PART VIII.

PROCURATORS.

28 & 29 *Vict.*, c. 85.—An ACT to amend the Laws relating to Procurators in Scotland.—5th July 1865.

WHEREAS the number of procurators practising before the Inferior Courts in *Scotland* has of late years greatly increased, and the interests intrusted to the care of such procurators have risen in importance: And whereas it is desirable to improve the qualifications and standing of the members of that branch of the legal profession, and to regulate the mode of admitting them to practice, and to confer corporate powers on certain faculties and societies: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. [*Interpretation of terms.*].—The following words and expressions when used in this Act shall have the meanings hereby assigned to them, unless there be something in the subject or context inconsistent with or repugnant to such construction; that is to say,

"Inferior Court" shall embrace Sheriff-Courts, Commissary Courts, Burgh Courts, Admiralty Courts, Dean of Guild Courts, Justice of Peace Courts, and all other courts of law having only local jurisdiction in *Scotland*:

"Procurators" shall include all persons who have already been admitted as procurators in any Sheriff-Court in *Scotland*, or as members of the Incorporated Society of Writers in *Dundee*, or who shall hereafter be admitted as procurators under this Act:

"Sheriff" shall include Steward, but not Sheriff-substitute or Steward-substitute:

"Sheriff-Clerk" shall mean Sheriff-Clerk Depute well as Sheriff-Clerk, and shall include Steward-Clerk and Steward-Clerk Depute:

"County" shall include stewartry.

2. [*No person to act as a procurator unless already or hereafter ad-*

28 & 29 Vict., c. 85.

mitted pursuant to this Act.—No person shall hereafter act or practice as a procurator before any Inferior Court, or assume the name or title of procurator, unless prior to the passing of this Act he shall have been duly admitted a procurator, or unless subsequently to the passing of this Act he shall be admitted a procurator pursuant to the directions and regulations of this Act.

3. [*Commissioners of stamps not to issue certificates except to qualified persons.*—From and after the passing of this Act, the Commissioners of Stamps and Taxes and their officers shall, previous to issuing any stamped certificate to any person applying for the same who has not previously had issued to him a like certificate, require evidence that such person is either a writer to the Signet, or a solicitor before the Supreme Courts, or a notary-public, or that he has been admitted a procurator.

4. [*Requisites to entitle persons to be admitted.*—No person shall hereafter be deemed admissible as a procurator unless he shall be of the full age of twenty-one years, and shall have been bound under an indenture in writing to serve, except as herein-after provided, at least four years as an apprentice to a master declared by this Act to be competent, and shall have duly served his said apprenticeship by personal attendance in the office of such master or in the office of some other master to whom his indenture may have been transferred, as herein-after provided, and unless he shall have been reported qualified for admission after an entrance examination in manner herein-after specified: Provided always, that any person who may before the passing of this Act have served, or may be at the date thereof in course of serving, an apprenticeship for a shorter term than four years, in such form as would have qualified him for admission under the provisions of the Act of Sederunt of the Lords of Council and Session, dated the tenth day of July One thousand eight hundred and thirty-nine, chapter five, shall be deemed admissible, in so far as regards apprenticeship, if he have served or shall serve, either as an apprentice or clerk to the same or some other competent master, such further term as may be sufficient along with his previous service to complete the full term of four years, and if he shall have been reported qualified as aforesaid, and such service may be instructed by a certificate under the hand of such master, or otherwise, as herein-after provided.

5. [*Requisites restricted in certain cases.*—Provided also, that any person who shall have taken a degree in arts in any one of the universities of Great Britain or Ireland, or who shall be a member of any

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of the councils of the *Scottish* universities, shall be deemed admissible as a procurator, in so far as regards apprenticeship, if he shall have served an apprenticeship under indenture as aforesaid for the shorter period of three years, and such person shall not be obliged as a part of his entrance examination to undergo an examination in general knowledge.

6. [*Who shall be deemed a competent master.*].—In reference to all apprenticeships and clerkships to be entered into in terms of this Act, any writer to the Signet or solicitor before the Supreme Courts, or procurator or sheriff-clerk, shall be deemed a competent master in the case of a person seeking to qualify himself as a procurator.

7. [*Provision in case master of persons entering into apprenticeship, &c., dies.*].—In case any master with whom any person shall have entered into any apprenticeship or clerkship as aforesaid shall, during the currency of the term of such apprenticeship or clerkship, die or become bankrupt, or cease to practise, or be unable to continue to employ such apprentice or clerk, it shall be lawful for the Sheriff of the county or Sheriff-substitute of the county, ward, district, or division in which such apprenticeship or clerkship is being served, upon the application of such apprentice or clerk, as the case may be, to direct the indenture or agreement of clerkship to be discharged, or to authorise the term of service to be completed with any other master declared competent by this Act and named in such application, without prejudice to the voluntary transfer of any apprenticeship or clerkship to a competent master mutually agreed upon, and made in writing.

8. [*One year of indenture under procurator may be commuted into clerkship.*].—Any apprentice who, either before or after the passing of this Act, has entered into an indenture for any period exceeding three years, and who may be desirous of making himself acquainted with the forms of procedure in the Supreme Courts, or with the mode of conducting business in any county other than that in which he has bound himself to serve, may, in lieu of the last year of his said apprenticeship, with the consent of his master, substitute a term of service as clerk for not less than one year with a writer to the Signet or solicitor before the Supreme Courts, or with a procurator practising in such other county, which service as clerk shall be equally effectual for the purpose of admission as if such apprentice had completed the full term of his apprenticeship.

9. [*Indentures to be recorded and service to be certified.*].—All indentures which shall after the passing of this Act be entered into

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with the intention of qualifying the apprentice for admission in terms of this Act, shall be recorded in the Register of Probative Writs of the county where the same shall have been entered into, within six months from the date fixed therein for the commencement of the term of apprenticeship, and upon the expiration thereof such indenture, with a certificate endorsed thereon, under the hand of the master with whom such apprenticeship was completed, setting forth that the party has actually and *bonâ fide* served the apprenticeship set forth in the application for admission as required by this Act, may be received as evidence of such apprenticeship having been duly served.*

10. [*Agreements to serve as clerk must be in writing and proved.*].—No service as clerk, in terms and for the purposes of this Act, entered into after the passing thereof, shall be held a qualification for admission as aforesaid, unless the agreement to serve as clerk for a specified time shall be entered into in writing before the commencement of service; and the production of a written agreement, with a certificate under the hand of the master of the time having been actually and *bonâ fide* served by personal attendance in his office, may be received as evidence of service; provided that in case of the death or incapacity of the master the Sheriff shall be entitled to receive such other evidence of service of apprenticeship or clerkship as shall seem to him reasonable and satisfactory.

11. [*Admission and entrance examination.*].—The admission of procurators shall, as heretofore, proceed on the application of any duly qualified person to the Sheriff of the county within which he wishes to practise; but such applicant shall, prior to admission, except as hereinafter provided, undergo an entrance examination in regard both to general knowledge and to law, and legal training and practice, on a remit made by the Sheriff to the examiners hereinafter mentioned, and no further procedure shall be had on such application until the applicant shall have been reported by the examiners qualified for admission: Provided always, that no entrance examination shall be required if the applicant for admission be a writer to the Signet, or a solicitor before the Supreme Courts, or hold a degree of bachelor of laws granted by a *Scottish* university after the twelfth day of *July* Eighteen hundred and sixty-two; nor shall the provisions of this Act in regard to the term of service apply to, nor shall any entrance examination in general knowledge be required from, any person who is under indenture at the passing of this Act, or who may have completed the term of apprenticeship prior to the passing of this Act;

* See 30 & 31 Vict., c. 96, § 23 (*ante*, p. clxxxix).

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provided also that the Sheriff of any county to whom an application for admission shall be made by any person who has been already admitted a procurator in another Sheriff-court shall be entitled to admit the said person, and also to dispense with such entrance examination, if he shall see fit, after hearing the incorporated faculty or society of procurators practising in the county, ward, district, or division in which such application is made.

12. [*Mode of admission.*].—On the production of the certificate of apprenticeship or of apprenticeship and clerkship, as hereinbefore provided, and of a certificate under the hands of the examiners of the applicant being duly qualified in regard both to general knowledge and to law and legal training, or of written evidence that the applicant falls within some of the exceptions herein-before contained, the Sheriff may, unless he see cause to the contrary, admit the applicant as a procurator in his court, and such admission shall qualify the person admitted to practise therein and in all the other inferior courts held within the county; provided that where the mode of admitting procurators in any county is regulated by Royal Charter conferring exclusive privileges on any faculty or society of procurators practising in such county, or by any usage following thereon, such mode of admission shall not be altered by anything in this Act contained without the express consent of such faculty or society.

13. [*Names of procurators to be registered.*].—The Sheriff-clerk of each county, or of each ward, district, or division, when a county is so divided, shall keep a register in a separate book, to be called the "Register of Procurators," in which he shall insert the names of all such persons then in life as may have been duly admitted procurators before the Sheriff-court of such county, ward, district, or division prior to the passing of this Act, and shall arrange such names in the order of the dates of admission of such persons respectively, and likewise of every person who shall subsequently to the passing of this Act be admitted a procurator before such court, pursuant to the directions and regulations herein contained, specifying in the register the date of such admission, and shall, as occasion requires, make the alterations on said register rendered necessary by death or otherwise, and said register shall be patent to all the lieges, and an extract therefrom subscribed by the Sheriff-clerk, certifying the admission of any procurator, and specifying the date thereof, and for which extract a fee of Two shillings and sixpence shall be payable, shall be sufficient evidence of the facts therein set forth.

14. [*Procurators may form societies when number is ten or upwards.*].

28 & 29 Vict., c. 85.

—In any county, ward, district, or division of a county in which there does not at the date of the passing of this Act exist an incorporated faculty or society of procurators, it shall be lawful for the procurators of such county, ward, district, or division, provided their number exceeds ten, voluntarily to form themselves into a society, by the assent given in writing of at least three-fourths of their number, and on such writing being recorded in the court books of the county, district, division, or ward, such society shall *ipso facto* be held to be incorporated under such name or title as shall in such writing be fixed, and shall include all the procurators of such county, ward, district, or division, and thereafter such faculty or society shall have power in its corporate name to sue and be sued, and to acquire, hold, and transfer property, heritable and moveable, and also from time to time to adopt such constitution and bye-laws for the management of the affairs of the society as the Sheriff of such county, ward, district, or division shall, on application made to him, approve of, and shall possess such other powers as by law belong to an incorporation.

15. [*How to be incorporated when number less than ten.*].—In the event of the number of procurators in any county, ward, district, or division being less than ten but more than three, it shall be competent to them, or to not less than three-fourths of their number, by their assent given in writing, to combine with the procurators in any one or more counties, wards, districts, or divisions, to form themselves into a society of procurators under this Act, provided the aggregate of the whole shall be at least ten; and on such assent being given in writing, and recorded in the court books of each of the said counties, wards, districts, or divisions, such society shall in all respects, for the purposes of this Act, be entitled to the same corporate powers and privileges as any other society formed under this Act; or otherwise, in the event of no such combination, the procurators of any county, ward, district, or division whose number is less than ten shall be entitled individually to become members of the society of procurators formed in any other county, ward, district, or division, in terms of this Act, and who shall be willing to receive them, and they shall on being duly admitted become members of said society: Provided always that in case of the procurators in two or more counties combining to form a society as aforesaid, the Sheriff of the county having the largest number of procurators at the time such society is formed shall alone exercise the functions which are conferred on Sheriffs by this Act in relation to such societies.

16. [*Powers of incorporated faculties and societies.*].— Every

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faculty or society of procurators already incorporated, or which shall after the passing of this Act be incorporated in terms thereof, shall from time to time, subject to the approval of the Sheriff, issue regulations for the preliminary examination in the elements of general knowledge of persons desirous of entering into indentures of apprenticeship with any procurator of their court or the sheriff's clerk, and without such examination, and the person undergoing the same being reported qualified, such indenture shall be of no force or effect for the purpose of admission as aforesaid; and such society may also, if it sees fit, subject in like manner to the approval of the Sheriff, impose a curriculum of legal study on the apprentices serving their time to the members of such faculty or society, and may institute compulsory examinations in law and in legal training and practice of such apprentices at the end of the second, third, and fourth years of their apprenticeship, under such regulations as to extending the period of apprenticeship, in case of failure satisfactorily to undergo such examinations, as may be established by and under authority of the General Council hereinafter appointed; and any society hereafter to be incorporated may establish a fund for the benefit of indigent members and of the widows and children of members, and provide for the use of the members of the society a law library, to be managed in such manner as may be settled by the Byelaws, and for these and other purposes may exact payment of such entrance fees from parties applying to be admitted as procurators, and such annual contribution from each member of the society, as may from time to time be fixed by the society, and be approved of by the sheriff as aforesaid; and in counties where no such society exists it shall be in the power of the Sheriff to order and enforce the preliminary and intermediate examinations aforesaid.

17. [*General Council.*].—The dean, president, or other chief officer bearer of each of the several faculties or societies of procurators already incorporated, or which shall after the passing of this Act be incorporated in terms thereof, or in his absence the sub-dean, vice-president, or other member of such faculty or society elected to act in his place, shall form a General Council of procurators for the purpose of exercising the powers conferred upon them by this Act, and shall meet at least once in each year at such time and place as may be fixed in manner hereinafter provided, any five members of such General Council being a quorum.

18. [*General Council to meet and frame byelaws.*].—The first meeting of such General Council shall be held at *Edinburgh* on *Monday* the

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thirtieth day of *October*, One thousand eight hundred and sixty-five, at one o'clock, within the Sheriff court-house, and the members present, after choosing an interim chairman, shall appoint a committee of their number to frame a draft of the Byelaws hereinafter mentioned, with instructions to report such draft to an adjourned meeting, to be held at a time and place to be then fixed; and it shall be lawful for such adjourned meeting, or any other meeting held by adjournment, to adopt the said Byelaws with or without amendments.

19. [*Office bearers and time and place of future meetings to be appointed.*].—The byelaws to be so framed and adopted shall provide for the yearly appointment of office bearers, and in particular of a president, and for the time and place of all meetings of the General Council and office bearers, and for the mode of calling the same, and for all other regulations necessary for beneficially transacting the business committed to the General Council by this Act, and for the future amendment of such Byelaws, if necessary.

20. [*Power to General Council to prescribe a Curriculum of legal study and frame Regulations as to subjects, &c.*].—The General Council shall prescribe a Curriculum of legal study for persons intending to apply for admission as procurators, and shall by themselves, or by one or more committees of their number, and with such assistance as the Council may see fit to appoint, act as examiners of persons applying for admission as procurators, and shall as soon as may be after the passing of this Act frame Regulations as to the subjects both in general knowledge and law, and legal training and practice, in which all persons applying for admission after a certain date to be therein fixed shall be examined as herein-before provided, in order to ascertain that they are in these respects qualified for admission, and also Regulations as to extending the period of apprenticeship of apprentices failing to undergo satisfactorily the compulsory examinations herein-before provided, and may, if need be, vary such Curriculum and Regulations to suit the peculiar circumstances of any county, and may also from time to time thereafter alter and amend such regulations respectively.

21. [*Such regulations to be submitted to Sheriffs convened as by 1 & 2 Vict., c. 119, and approved by Lord President, Lord Justice-Clerk, and Judges of the Court of Session.*].—The Curriculum, Regulations, and Byelaws to be framed by the General Council as aforesaid, or any future alterations or amendments thereof, shall be of no force or effect unless the same have been submitted to the Sheriffs of *Scotland* convened as directed by the Act First and Second *Victoria*, chapter one

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hundred and nineteen, section thirty-two, and reported on by the meeting so convened, or any adjourned meeting of the Sheriffs, to the Lord President of the Court of Session, the Lord Justice-Clerk, and the other Judges of the Court of Session, and have been approved of by them, and until the said Regulations are so approved of the rules in operation in each county, ward, or district for the examination of persons applying for admission shall continue in force.

22. [*General Council to fix time and place and fees of examinations.*]—The General Council shall also from time to time fix the times and places at which such examinations may most conveniently be conducted, and shall also, subject to the approval aforesaid, fix the fees to be paid by the applicants to defray the expense of such examinations and the application of the fees so paid.

23. [*Expenses of General Council how to be provided for.*]—The General Council may from time to time exact such contributions from the various faculties and societies already incorporated, or to be incorporated under this Act, as shall be required for the necessary expenditure of the General Council and office bearers thereof, and that as nearly as may be in proportion to the numbers of members of such faculties or societies, and may recover payment of such contributions by action at law, to be brought in name of their president or of any of their office bearers whom they may appoint for that purpose, at account of which contributions and expenditure shall be made up annually, and copies transmitted to the dean, president, or other chief officer of every such faculty or society.

24. [*How procurator may be suspended from practice or struck off register.*]—No person who has been admitted a procurator in terms of this Act shall be liable to have his admission challenged or set aside on any ground except fraud; reserving nevertheless to and empowering the Sheriff of each county, ward, district, or division, aforesaid, on a written complaint made and cause shown to him by any incorporated faculty or society of procurators practising in his court, and where there is no such faculty or society, then by any three or more procurators practising in such court, to call before him on six days *inducias*, and thereafter, whether with or without comparison, to suspend from practice, or to strike off the register the name of any procurator registered in his court whom he may deem guilty of gross misconduct, which sentence shall contain within it a statement of the facts and grounds on which it proceeded, and shall be subject to review and stay of execution only by petition of appeal to be presented within six months from the date of such sentence, :

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the Inner-House of the Court of Session sitting in either Division, who may hear any person interested thereon, and may confirm or reverse the sentence of the Sheriff, with or without further inquiry, without prejudice to the Sheriff and Sheriff-substitute exercising all powers competent to them at common law in such matters.

25. [*Power to procurators to complain to the Sheriff of unqualified procurators. Penalty on procurator lending his name to unqualified persons.*—Any procurator shall be entitled to complain to the Sheriff in whose court he is entitled to practise, against any person practising in such court who is not a procurator thereof; and the Sheriff shall, on such complaint being proved to his satisfaction, interdict such person from practice; and any procurator who shall knowingly and wilfully lend his name to enable any person who is not a procurator to practise as such, may, on a complaint made as aforesaid, be summarily suspended from practice, or struck off the register, and the sentence of the Sheriff in either case shall be subject to review and stay of execution only in manner foresaid.

26. [*Effects of Sheriff's sentence.*—The sentence of any Sheriff striking a procurator off the register shall entitle any incorporated faculty or society as aforesaid of which he is a member to expel him from the body, and he shall thereupon forfeit all his rights and privileges as a member thereof, except his right to a share of any fund for behoof of widows or children. Provided that during the period allowed for appeal as aforesaid, and during the dependence of such appeal, the party against whom the Sheriff's sentence shall stand shall be disabled from exercising any of the rights, functions, and privileges of a procurator.

27. [*Nothing to prejudice privileges of certain public bodies. Power to faculty, &c., to make bye-laws and to alter its name.*—Nothing in this Act contained shall be held to limit or prejudice the rights and privileges of the following public bodies; that is to say, the Society of Writers to Her Majesty's Signet, the Society of Solicitors in the Supreme Courts, the Society of Solicitors at Law, *Edinburgh*, the Faculty of Procurators in *Glasgow*, the Faculty of Procurators in *Paisley*, or the Society of Advocates in *Aberdeen*, or any other such faculty or society holding a royal charter: Provided always that it shall be competent to any faculty or society of procurators incorporated before the passing of this Act, notwithstanding the terms of their charter, to pass such byelaws as may be necessary to assimilate, in whole or in part, the conditions and mode of admission to the privileges of their incorporation to the provisions of this Act: Pro-

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vided also that it shall be competent to any such faculty or society of procurators, if they shall so desire, by the assent given in writing of at least three-fourths of the members registered as herein-before provided, and on the register at the time, to alter its name or title without prejudice to its existing powers and privileges.

28. [*Saving rights of certain persons.*].—Nothing in this Act contained shall be held to repeal the privileges conferred by former Acts of Parliament on persons who may be qualified to practise as agents in the Court of Session of practising in certain cases before the Sheriff-courts of *Scotland*, or to prejudice or affect the rights or privileges of any person appointed to be solicitor or attorney on behalf of Her Majesty, under the orders or directions of the Commissioners of the Treasury, Customs, Inland Revenue, or under the orders or directions of any Commissioners or other persons or person having the management of any other branch of Her Majesty's Revenue for the time being, or under the authority of any Act of Parliament, or of any person now holding or who may hereafter be appointed to the office of Procurator-Fiscal in any inferior court.

29. [*Saving rights of Notaries-Public.*].—Nothing in this Act contained shall prejudice the rights and privileges of Notaries-Public, or affect the manner of their admission to office.

30. [*Short title.*].—This Act may be cited as “The Procurators (*Scotland*) Act, 1865.”

BYE-LAWS for the General Council of Procurators, approved
of by Court of Session, 22nd June 1866.

The General Council of Procurators considering that, by the 18th and 19th sections of the Act 28 and 29 Vict., cap. 85, intituled “The Procurators (*Scotland*) Act, 1865,” power is given to them to frame Bye-laws which, as thereby required, shall provide for the yearly appointment of office-bearers, and, in particular, of a President, and for the time and place of all meetings of the General Council and office-bearers, and for the mode of calling the same, and for all other Regulations necessary for beneficially transacting the business committed to the General Council by the said Act, and for the future amendment of such bye-laws, do therefore, in virtue of the powers conferred upon them by the said Act, enact, constitute, make, and ordain the following Bye-laws and Regulations, which they do hereby declare shall come into operation from and after the date when they shall have been approved of in terms of the Statute.

A. S., 22d June 1866.

Chap. I.—*Meetings.*

1. The General Council shall hold a general annual meeting on the first Thursday after the 15th day of September, at One o'clock afternoon.

2. The general annual meetings shall be held at Edinburgh and Glasgow alternately, unless some other city or burgh shall have been fixed upon by the immediately preceding meeting. The first general annual meeting shall be held at Edinburgh.

3. The President, or in his absence, the Vice-President, may, when and so often as he shall deem necessary, call a special meeting of the General Council, to be held at such time and place as he shall fix; and he shall likewise do so as soon as possible after the death or resignation of any office-bearer; and at any time on receiving a requisition from any five members of the General Council. He shall give written notice of the time and place of all such meetings to the Secretary at least ten days before the date of such meeting, and

shall specify the business to be brought before such meeting.

4. In the event of the President, or in his absence the Vice-President, refusing to call, or being in any way prevented from calling, any special meeting of the General Council, the Secretary shall have power to do so on receiving a requisition, in writing, to that effect, signed by any five members of the council.

5. If at any meeting there shall not be present a sufficient number of members to make the quorum required by the Act, the meeting shall be held to be adjourned till the twenty-first day thereafter, of which adjourned meeting the Secretary shall send notice, as prescribed in section 5th of Chapter II.

6. At all meetings of the General Council, or of any committee thereof, the President, or in his absence the Vice-President, or in the absence of both, a member specially appointed by the meeting, shall act as Chairman; and the Chairman shall have a casting as well as a deliberate vote.

Chap. II.—*Office-Bearers.*

1. The General Council shall, at the first meeting held after the approval of these Bye-laws, and thereafter at their general annual meetings, elect the following office-bearers, who shall hold office till next annual election, and who shall be eligible for re-election, viz., a President, a Vice-President, a Secretary, and a Treasurer (which last two offices may be held by the same person), and five special Councillors.

2. In the event of any office-bearer dying or resigning, a successor for the year current shall be elected at a special meeting of the

General Council, to be called as before mentioned.

3. The office-bearers for the time being shall be called the Committee of Management, and it shall be their duty, subject to the orders and control of the General Council, to manage and direct such of their affairs as shall from time to time be remitted to them.

4. Meetings of the Committee of Management shall be fixed by the President, or in his absence by the Vice-President, and shall take place as often as necessary for the despatch of business; and three members shall form a quorum;

Bye-Laws of Council.

and intimation of such meetings shall be given to the Secretary at least ten days before they take place, to enable him to call the meeting as provided by section 5th.

5. It shall be the duty of the Secretary (subject to the control of the Committee of Management) to conduct the correspondence, to give written notice to the Dean or chief office-bearer of each incorporated faculty entitled to be represented in the General Council, of all meetings of the General Council, at least *fourteen* days before annual meetings, and at least *eight* days before special meetings, specifying shortly, in the case of special meetings, the nature of the business to be transacted; and also to give similar notice to each member of the Committee of Management, or any other committee, of all meetings of committees, at least eight days prior thereto; to attend all such meetings of the General Council or committees; to prepare the minutes thereof, and submit them for approval to the next meeting; to keep the minute-book, containing the register of incorporated societies, with copies of their deeds of incorporation, if under the Act, and a book containing a list of the

members of the General Council. He shall receive, besides necessary outlays, a salary at the rate of twenty-five guineas annually, such salary being subject to revision at each election of office-bearers.

6. It shall be the duty of the Treasurer to collect the funds payable to the General Council, and disburse the same under their direction; to make up accounts thereof annually to the 1st of July, and transmit copies to the Dean, President, or other chief office-bearer of every incorporated faculty or society entitled to be represented in the General Council, at least one month before the general annual meeting; and said accounts shall be examined by the Committee of Management prior to said meeting, and if found correctly stated and vouched, shall be dequoted by the Chairman, and the same shall thereafter be laid before the annual general meeting, and the approval of said meeting shall be a sufficient discharge to the Treasurer. The Treasurer shall be paid a salary at the rate of fifteen guineas annually, besides necessary outlays, such salary being subject to revision at each election of office-bearers.

Chap. III.—*Alteration of Bye-laws.*

1. No motion for the alteration of any existing, or the adoption of any new Bye-law, shall be entertained at any meeting, unless three

months' notice thereof shall have been given, through the Secretary, to the office-bearers and members of the General Council.

CURRICULUM AND REGULATIONS in regard to Examination of Intending Procurators and Extension of Apprenticeships, prepared by the General Council, and approved of by the Court of Session, 22nd June 1866.

The General Council of Procurators considering that, by the twentieth and twenty-second sections of the Act 28 and 29 Vict., cap. 85, intitled

A. S., 22d June 1866.

"The Procurators (Scotland) Act 1865," power is given to them to prescribe a Curriculum of legal study for persons intending to apply for admission as procurators to act as examiners of such persons; to frame Regulations as to the subjects, both in general knowledge and law, and legal training and practice, in which such persons shall be examined, and also, Regulations as to extending the period of apprenticeship of apprentices failing satisfactorily to undergo the compulsory examinations enjoined by the Act; to fix the time and places at which the examinations of persons applying for admission as procurators may be most conveniently conducted; and to fix the Fees to be paid by the applicants to defray the expense of such examinations, and the application of the fees so paid, Do therefore, in virtue of the powers conferred upon them by the said Act, enact, constitute, make, and ordain the following Curriculum and Regulations, which they do hereby declare shall come into operation from and after the date when they shall have been approved of in terms of the Statute.

Chap. I.—*Examinations, &c.*

1. The office-bearers, with three other members of the General Council, to be appointed by the Committee of Management, shall be examiners of all persons applying for admission as procurators under the Act, and shall be eligible for re-election; and in the event of the death or resignation of any of the three examiners appointed by the Committee of Management, another member shall be appointed in his place, who shall act till next election of office-bearers.

2. Diets for examination shall, if the Committee of Management find they are required, be held three times each year, viz.—on the second Thursday of January, the second Thursday of April, and the second Thursday of September, at Edinburgh, Glasgow and Aberdeen, or any of them, as the General Council may consider necessary, at Eleven o'clock A.M., or at such other times, and at such places in these cities, as the General Council may appoint. The first diet of examination shall be held in Glasgow on a day to be fixed by the General

Council as soon as these regulations shall be approved of in terms of the Statute; and the Committee of Management shall appoint three examiners to be present at each diet of examination, without prejudice to any of the other examiners attending any diet of examination. And the General Council shall have power at any annual meeting to appoint other cities or burghs in place of those specified for holding said examinations.

3. Every applicant for admission as a procurator under the Act, after the 1st day of January 1868, shall produce to the examiners evidence of having attended at least the classes of Scots Law and Conveyancing, in a Scotch University; but this rule shall not apply to any person who was under indenture at 5th July 1865 (the date of the passing of the Act), or who had completed the term of his apprenticeship prior to that date.

4. The examinations shall, except in the cases referred to in Section V of the Act, consist of two parts—I. General Knowledge;

Curriculum and Examinations.

II. Law and Legal Training and Practice; and shall be partly written and partly oral.

5. The examination in General Knowledge shall embrace the following subjects:—

1. English Composition.
2. History of Rome; and of England and Scotland.
3. Geography.
4. Arithmetic.
5. The Elements of Book-keeping.
6. Latin: any Book of the *Æneid*; or of *Cæsar's Commentaries*, to be selected by the Applicant.
7. Logic, or, in the option of the applicant,
8. Mathematics; First Three Books of *Euclid*.

6. The examination in Law and Legal Training and Practice shall embrace the following subjects:—

1. Scots Law, including Criminal Law and the Law of Evidence.
2. Conveyancing.
3. Forms of Process, both in Civil and Criminal Cases.

7. Every applicant shall have the option of being examined in General Knowledge and in Law and Legal Training and Practice, either on the same occasion, or at different diets of examination.

8. Every applicant for admission shall communicate to the Secretary in writing his wish to be examined, at least twenty-one days before such examination; and he shall at the same time transmit his discharged indenture, or other evidence of apprenticeship, and a certificate of his having passed any examinations required during his apprenticeship, with his certificates of attendance at the classes specified in section 8rd of this chapter; and also, in the event of his having

such qualification, evidence of his being a Master or Bachelor of Arts in any one of the Universities of Great Britain or Ireland, or evidence of his being a Member of Council of any Scottish University; and in such communication he shall state whether he wishes to be examined at the same diet both in General Knowledge and in Law and Legal Training and Practice, or in one only of these classes of subjects, and he shall, at the same time, remit the sum of Five Guineas as examination fee, to be applied as after provided.

9. If the Examiners shall find the applicant duly qualified for admission, they shall draw out and subscribe a report to that effect; but in the event of his being found not duly qualified, he shall be entitled to renew his application to be examined at the next or any subsequent diet of examination, on remitting the sum of One Guinea in full of additional examination fee.

10. The sums paid as examination fees shall be applied towards defraying the expenses of the examinations, and the surplus, if any, shall every year be carried to the credit of the account of the General Council, from whose funds any deficiency to meet the expense of the examinations shall be made up yearly.

11. The Committee of Management shall, if they see fit, employ properly qualified persons to act the examiners and shall pay such persons a sufficient remuneration for their trouble.

12. Each examiner shall receive as a remuneration for his trouble and loss of time a sum of Three Guineas for each diet of examination which he may be appointed to attend and shall attend, and also payment of his outlays.

A. S., 22d June 1866.

Chap. II.—Apprentices.

1. In the event of any apprentice failing satisfactorily to undergo any of the compulsory examinations which by the 16th Section of the Act may be instituted by any incorporated faculty or society, or in counties where no such societies exist, by the Sheriff of such counties, at the end of the second, third

and fourth years of his apprenticeship, such apprentice shall not be entitled to apply for examination, in order to admission as procurator, without producing evidence of his having served an additional period of three months for each failure beyond the period otherwise required for admission.

Chap. III.—Alteration of Regulations.

1. No motion for the alteration of any existing, or the adoption of any new regulation, shall be entertained at any meeting, unless three

months' notice thereof shall have been given, through the Secretary, to the office-bearers and members of the General Council.

PART IX.**ADMISSION OF SHERIFF OFFICERS.**

The following "RULES AND REGULATIONS" were submitted to, and approved of, at a meeting of Sheriffs, held in the Advocates' Library, on 11th December 1867, and copies were directed to be sent to each Sheriff, in order that he might, if, and in so far as he thought proper, adopt them by an order of Court:—

1. Any person desirous of being admitted as a Sheriff-officer shall present a petition to the Sheriff of the county within which he wishes to practise, stating his name, designation, age, parentage, and course of education, along with certificates of sobriety, general character, etc., and specifying the place where he proposes to act.

2. The Sheriff, if satisfied that an officer is required at the place specified, may, after intimation for a month on the walls of the Sheriff Court-house and Sheriff-clerk's

office, remit the petitioner for examination to examiners to be named from time to time by the Sheriff.

3. The examination may be either completed at once, or at different times, and may be partly oral and partly written, and the subjects of examination, which may be modified in the discretion of the Sheriff, shall consist of—

1. English grammar and reading.

2. Writing to dictation, including spelling and handwriting.

Admission of Sheriff Officers.

3. Arithmetic—first four rules, simple and compound reduction, and simple proportion.

4. Law—Campbell on Citation and Diligence, in so far as applicable to the duties of Sheriff-officers; or Gillespie on Powers and Duties of Sheriff-officers.

4. The Examiners shall report in writing the result of the examination in each branch to the Sheriff, who, after considering the report, may find the petitioner qualified, or remit him back for examination in whole or in part, or find him not qualified to be admitted as a Sheriff-officer.

5. After having been found qualified, the petitioner shall find caution by bond, with two cautioners, to the satisfaction of the Sheriff-clerk, or by a bond of an approved guarantee society, and that he will duly discharge the duties of his office, and lodge the bond in the hands of the Sheriff-clerk; and having done so, he will be admitted to act during the pleasure of the Sheriff, and shall take the usual oath *de fidei* in presence of the Sheriff or Sheriff-substitute.

6. Each Sheriff-officer shall, in the event of either of his cautioners becoming bankrupt, or dying, or leaving Scotland, immediately

intimate the fact to the Sheriff-clerk, and thereupon find new caution. In the event of his not finding new caution within a month of either of the cautioners becoming bankrupt, or dying, or leaving Scotland, the officer's name may be struck off the roll of officers.

7. Any cautioner desiring to be relieved of his cautionary obligation, must apply to the Sheriff, by petition, one month before the date from which he desires to be relieved, so that the officer may have time and opportunity to find new caution.

8. The sheriff-clerk shall keep a roll of Sheriff-officers, containing the name and residence of each Sheriff-officer in the county, and the name, designation, and residence of their respective cautioners; and the Sheriff-clerk shall, within fourteen days after the 1st October annually, transmit a copy of the same to the Sheriff, accompanied with any remarks he may think proper as to the conduct, sobriety, etc., of the officers, and stating whether, so far as he knows, any of the cautioners have become bankrupt, or have died, or left Scotland. If any officer from any cause, becomes unfit for duty, his name will be struck off the roll of officers.

A. S., 1st March 1861.

PART X.

PROCURATORS' FEES.

ACT OF SEDERUNT regulating the Fees of Procurators in the Sheriff, Stewart, and Commissary Courts.—Edinburgh, 1st March 1861.

The Lords of Council and Session, considering that by the Act 16 and 17 Vict., c. 80, section 49, the Court is "authorised and required to frame, from time to time, a Table or Tables of Fees for business in the Sheriff-courts of Scotland, and such Table or Tables of Fees so framed shall be submitted to the Secretary of State for the Home Department, and if approved of shall form the rule of professional charge for business performed in such Courts;" and by the Act 21 and 22 Vict., c. 56, section 18, the Court is also authorised and required, from time to time, to pass such Acts of Sederunt as shall be necessary and proper for regulating the Fees to be paid to agents before the Courts of the Commissary of Edinburgh, and other Commissaries in Scotland: And considering that, by the alterations in the forms introduced by the said Acts, the Act of Sederunt of 10th March 1849, regulating the Fees of Procurators in the Sheriff, Stewart, and Commissary Courts, was rendered in some respects inapplicable, and that interim Tables of Fees were established by Acts of Court in the different sheriffdoms after the passing of the first mentioned Act, under an Act of Sederunt passed by the Court on 7th March 1855: And considering that it is now expedient to establish a new and uniform Table of Fees for Procurators in the Sheriff, Stewart and Commissary Courts—Do therefore, in virtue of the powers conferred by the said Act 16 and 17 Vict., c. 80, and 21 and 22 Vict., c. 56, repeal, from and after the 3d April next, the said Act of Sederunt of the 10th March 1849 and renewals thereof, and all interim Tables established by Acts of Court of the Sheriffs as aforesaid, so far as regards the Fees of Procurators, and enact, ordain, and declare that, in place thereof, the Regulations and Table of Fees hereto annexed, which have been submitted to the Secretary of State for the Home Department, and approved of by him, shall, from and after the said 3d day of April next, be acted upon as the rule of charge in regard to the Fees of Procurators in Sheriff, Stewart and Commissary Courts, until the same shall be altered by the Court.

And the Lords appoint this Act, and the relative Regulations and Table of Fees, to be engrossed in the Books of Sederunt, and printed and published in common form.

DUN. M'NEILL, *I.P.D.*

Procurators' Fees.

GENERAL REGULATIONS.

1. There shall be three scales of taxation, viz.:—*First*, for causes where the amount of principal and past interest concluded for does not exceed £25; *Second*, for causes where the amount concluded for as aforesaid exceeds that sum, but does not exceed £100; and *Third*, for causes where the amount concluded for as aforesaid exceeds £100.

2. Where the demand does not exceed the sum which may be competently concluded for in the Sheriff's Small-Debt Court, no fees shall be allowed except those authorised by the Act 1st Vict., c. 41, unless the Sheriff see cause to the contrary (see § 36 of that Act), it being always competent to the Sheriff, when a case is removed from the Small-Debt Court to the Ordinary-Court, or at any subsequent stage of the process, to determine whether it is to be conducted and charged for according to the annexed tables, or on the principle that no other or higher fees are to be taken than those allowed by 1st Vict., c. 41.

3. The scale for taxation shall in the ordinary case be determined by the amount concluded for; but it shall be competent for the Sheriff, if he see cause, to direct the amount to be taxed according to the scale applicable to the amount decreed for; this, however, shall not affect the ordinary power of the Sheriff to declare that such expenses shall be subject to modification.

4. In all cases the Sheriff may disallow all charges for entire papers or parts of papers, or for steps of procedure or agency which appear to him to have been irregular or unnecessary.

5. The fees allowed at pronouncing or reporting interlocutors (No. 12), also at taking appeals (No. 20), shall be held to include intimations (where necessary) to the client and opposite party. The fees for debates are not to be according to the time occupied, but single fees. They are to include the attendance at giving judgment, unless when avizandum has been made, when the fee No. 12 will be allowed. The agent shall be entitled to charge for a copy of the minutes of procedure up to the closing of the record; and also for a copy of every subsequent interlocutor and note on the merits of the cause, and of all interlocutors and notes sustaining, repelling, or reserving preliminary defences, but not of those excepted under Art. 12 of the subjoined table. The agent shall be allowed to charge for a copy of the closed record and proof, and also for a copy of the productions in so far as the Sheriff may think it necessary, preparatory to debating.

6. In order to prevent delay by frequent meetings for adjusting and closing the record, only one fee shall be allowed in each case for all the duty connected with this part of the procedure, however frequent the meetings may be; except when the Sheriff shall direct a record to be made up on preliminary defences; or when a record already closed shall be ordered to be opened up and adjusted and closed of new; in each of which cases the Sheriff may, if he shall see fit, allow a single fee in like manner. Where the Sheriff shall by interlocutor direct parties to debate some point specified therein, the debate fee Art. 14, will be allowed. No sepa-

A. S., 1st March 1861.

rate fee shall be allowed in respect of the deliverance "record closed."

7. Wherever a procurator on one side attends any meeting ordered by the Sheriff for adjusting the record, or for any other purpose, and the other is absent or not prepared to proceed, the Sheriff shall have power to decern against the opposite party for payment of the fee for attendance to the procurator who is ready. And when no notice has been sent of the withdrawal of an appeal at least two lawful days before the date fixed by the Sheriff for an oral hearing, two-thirds of the fee for the debate will be allowed to the respondent's agent.

8. Procedure in removings and ejections to be charged by the amount of rent. Where the amount of rent is not set forth in the summons, or is not set forth as exceeding £25, the charges shall be according to Scale I.

9. In actions *ad factum præstandum*, for exoneration, and others where the pecuniary amount or value of the matter in question cannot be measured or ascertained from the process, the charges shall be according to Scale II., unless it shall appear to the Sheriff proper in the circumstances to direct otherwise.

10. In actions where there are more defenders than one pursued for different debts, or summoned to remove from different premises, full charges for writings will be allowed for the highest of the rents or sums charged for,—one-fourth only of the ordinary fees will be allowed on each of the other rents or sums,—and the whole amount will be apportioned among the different defenders, according to the debts for which they are respec-

tively sued, or the rents of the premises from which they are respectively summoned to remove. But in such cases the procurator will be allowed to charge one-half only of the fees under Art. 12 of the table against each defender, according as the amount of his debt, or the rent of the subject from which he is summoned to remove, falls under Scale I. II. or III.

11. The principal interlocutor sheets shall not be given out to parties; a certified copy thereof shall be made up by the clerk from time to time, and put in process, for which he shall be allowed to make a charge at the end of the process for the total number of sheets contained therein, according to Art. 6 of the Table, to be paid by the party found liable in expenses, or, where no expenses are found due, by the parties equally.

12. Every sheet of two pages shall contain 250 words; but if the whole writing does not extend to 250 words, the fee for a sheet is, notwithstanding to be chargeable for such writing; and if, after finding the number of sheets which any writing shall comprise, calculated at the above rate, any number of words less than 250 shall remain, such fewer number of words shall be charged as a sheet.

13. Auditors shall not allow charges for payments to officers, or other outlay, unless vouchers be produced.

14. No other or higher fees shall be allowed than those hereby authorised; and the rates of charge in the subjoined Table shall be held as applicable to the taxation of accounts, as well between agent and client as between party and party.

DUN. McNEILL, J.P.D.

A. S., 1st March 1861.

	SCALE I. £ s. d.	SCALE II. £ s. d.	SCALE III. £ s. d.
<i>Attendances.</i>			
10. (a) At the meeting under § 3 of the statute to explain the grounds of action and defence to the pursuer's agent,	0 5 0	0 7 6	0 10 0
(b) If a full record be ordered to be made up, the defender's agent will at this stage be allowed,	0 10 0	0 15 0	1 0 0
(c) But if the record be closed <i>on a minute</i> at this or at an adjourned meeting, the pursuer's agent will be allowed, instead of (a), <i>supra</i> ,	0 7 0	0 10 0	0 12 0
And the defender's agent will be allowed, instead of (b), <i>supra</i> ,	0 15 0	1 2 6	1 10 0
<i>Note.</i> —These fees to be in full of all charges for attendances (however numerous), and hearings, and preliminary or incidental discussions in the matter of closing the record by way of minutes, and writings relative thereto, unless the Sheriff shall by a special interlocutor order a debate.			
11. At the meeting with the Sheriff, under § 4 of the Act (including all adjournments) and meetings for revisal or otherwise, for adjusting and closing the record on condescendence and defences, or revised condescendence and defences,	0 10 0	0 15 0	1 0 0
<i>Note.</i> —This fee is to include all the attendances, however numerous, up to the closing of the record, and to cover all discussions on dilatory defences, &c.; except (1st) when the Sheriff orders a separate record on dilatory defences to be made up (as in regulation VI); or (2d) when the Sheriff by a special order appoints a full debate on such points.			
12. At pronouncing or reporting any interlocutor (except interlocutors closing the record, or in the course of proofs, or fixing diets, disposing of motions for prorogations, making avizandum,			

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	SCALE I.			SCALE II.			SCALE III.		
	£	s.	d.	£	s.	d.	£	s.	d.
has been rendered unnecessary by admissions or other procedure after precognition,	0	2	6	0	8	6	0	5	0
<i>Note.</i> —No precognition fee will be allowed, unless a written Precognition shall be exhibited to the Sheriff-clerk, for the purpose of being authenticated by his initials before the party commence his proof, and which precognition, so marked, must at taxing be produced to the auditor.									
17. Outlay :—									
The reasonable travelling expenses (including subsistence) of agents travelling to attend inspections, commissioners, reporters, or judicial referees, and to precognosce witnesses, serve protests, or other necessary business, will be allowed, but only when they are necessarily required to go to a distance from the place where the Court is held, and when vouched to the satisfaction of the auditor.									
18. Attendance on auditors :—									
At taxation of expenses, when the decree is in absence,	0	1	0	0	1	6	0	2	0
In litigated cases, and under diligence—									
When the account is under £5,	0	2	6	0	8	0	0	8	6
£5, and under £20,	0	3	6	0	5	0	0	6	0
£20 and upwards,	0	4	0	0	6	0	0	7	6
19. Attendance at the Clerk's office :—									
1. Entering appearance, presenting summons, defences, and other papers, except appeals, and getting them marked and entered in the inventory of process; ordering caption, for each necessary enrolment, including intimation, and pursuer's agent inquiring whether appearance has been entered	0	1	0	0	1	6	0	2	0
2. For each borrowing	0	0	6	0	0	6	0	0	6
For each return	0	0	6	0	0	6	0	0	6
20. For drawing and lodging or minuting each appeal, or note of appeal	0	2	0	0	2	6	0	3	0

Procurators' Fees.

	SCALE I.			SCALE II.			SCALE III.		
	£	s.	d.	£	s.	d.	£	s.	d.
<i>General Agency.</i>									
21. For obtaining extracts of decrees, interim or final, and for procuring warrants	0	2	0	0	2	6	0	3	6
22. Instructing officer to serve summons, petition, edict, breve, or other instrument requiring service, or instructing the Clerk of Court or officer to execute any warrant, and revising execution,	0	2	0	0	2	6	0	3	6
<i>Note.</i> —When more executions at same stage of the process than one are necessary, and more than one officer must necessarily be employed, this fee is to be allowed for instructing and revising each necessarily separate officer and execution.									
23. Instructing counsel to prepare written pleadings, or to attend a verbal debate, wherever the judge shall either authorise or subsequently approve of such employment,	0	6	8	0	6	8	0	6	8
24. Revising a paper prepared by counsel, when such employment is so authorised or approved of,	0	5	0	0	7	6	0	10	0
25. For auditor's fees or taxes:—									
In decrees of absence,	0	1	0	0	1	0	0	1	0
In litigated cases where the account is under £10,	0	2	6						
" 10 and under £20	0	5	0						
" 20 " 50	0	7	6						
" 50 " 100	0	10	0						
" 100 " 150	0	15	0						
" 150 and upwards,	1	0	0						
25. Agency:—									
Conducting proceedings under edicts of executry until confirmation, and under tutorial or curatorial edicts and briefs, till ready for extract.									
<i>(See full Table for Proceedings in Commissary Court.)</i>									
<i>Personal Diligence.</i>									
27. Instructing officer to charge, and revising his execution,	0	2	0	0	2	6	0	3	6
28. Copy executions for record— <i>per sheet</i> ,	0	1	0	0	1	0	0	1	0
29. Procuring executions recorded,	0	2	0	0	2	6	0	3	6
30. Drawing Minute for <i>Fiat</i> ,	0	3	0	0	4	0	0	5	0

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[illegible]

Procurators' Fees.

	SCALE I.			SCALE II.			SCALE III.		
	£	s.	d.	£	s.	d.	£	s.	d.
<i>Advocations.</i>									
44. Intimating to Clerk of Court and opposite party	0	2	0	0	2	6	0	3	6
45. To advocator's agent for procuring bond of caution, and getting it executed and lodged,	0	3	0	0	4	0	0	5	0
46. To agent of opposite party for inquiries as to sufficiency of cautioner,	0	3	0	0	4	0	0	5	0
47. Any discussion or other proceedings will be regulated by §§ 3, 4, 9, 12, 13, 14, &c.									
<i>Loosing Arrestments.</i>									
48. Fee procuring bond of caution and getting it executed and lodged,	0	3	0	0	4	0	0	5	0
49. Fee obtaining loosing,	0	2	0	0	2	6	0	3	6
50. The fees for any inquiries or discussion occurring here to be regulated as in §§ 45, 46, 47, &c.									
<i>Affidavits.</i>									
51. Same as in No. 5.									
<i>Advertisements.</i>									
52. Wherever ordered by Statute or by the judge— <i>per sheet</i> ,	0	3	0	0	4	0	0	5	0
53. One fee only for ordering insertion, whether in one or more newspapers,	0	2	0	0	2	6	0	3	4
<i>Appeals to Circuit-Court of Justiciary.</i>									
54. Drawing Appeal— <i>per sheet</i> ,	0	3	0	0	4	0	0	5	0
55. Procuring bond, and getting signed and lodged,	0	3	0	0	4	0	0	5	0
56. Serving copy, indorsing certificate, and lodging with clerk,	0	3	0	0	4	0	0	5	0
57. All the other business to be charged for according to the fees for similar business in the foregoing Table; excepting attendance in Court when the appeal is discussed, for which a charge <i>per hour</i> will be allowed of,	0	3	0	0	4	0	0	5	0
<i>Procurator-Fiscal.</i>									
58. For his concurrence, <i>when</i> required,	0	1	6	0	2	0	0	3	0

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FOR BUSINESS IN THE COMMISSARY COURT.

	SCALE I.			SCALE II.			SCALE III.		
	£	s.	d.	£	s.	d.	£	s.	d.
59. Drawing petition for decree-dative,	0	4	0	0	5	0	0	6	0
60. Presenting petition at commissary office, and directing the necessary publication,	0	2	0	0	2	6	0	3	6
<i>In application for Confirmation of Executors qua Creditor—</i>									
61. Drawing inventory of productions, as in No. 8,	0	1	0	0	1	6	0	2	0
<i>After Publication of Petition for Decree-dative—</i>									
62. Attendance in Court, moving for and obtaining decree-dative,	0	3	6	0	5	0	0	6	8
<i>For Inventory of Moveable Estate—</i>									
63. Fee for attendance, obtaining the necessary information relative to the nature of the moveable estate and all other particulars necessary to enable the inventory to be prepared,	0	3	6	0	5	0	0	6	8
64. Drawing inventory— <i>per sheet</i> ,	0	4	0	0	5	0	0	6	0
Extending ditto— <i>per sheet</i> ,	0	1	6	0	1	6	0	1	6
65. Drawing deposition,	0	2	6	0	2	6	0	2	6
66. Attendance before the Commissary or Justice of Peace, or other party authorised to administer the oath with the executor when the oath is taken,	0	3	6	0	5	0	0	6	8
67. Agency taking out bond of caution, getting it subscribed, and thereafter lodging it with the clerk,	0	3	6	0	5	0	0	6	8
68. Agency procuring attestation of cautioner's sufficiency,	0	2	0	0	2	6	0	3	4
<i>Where it is necessary to obtain Restriction of Caution—</i>									
69. Drawing petition— <i>first sheet</i> ,	0	4	0	0	5	0	0	6	0
Each succeeding necessary sheet,	0	2	0	0	3	0	0	4	0
70. Fee on interlocutor ordering advertisement,	0	3	6	0	5	0	0	6	8
71. Fee on interlocutor restricting or refusing to restrict caution,	0	3	6	0	5	0	0	6	8

Procurators' Fees.

	SCALE I. £ s. d.			SCALE II. £ s. d.			SCALE III. £ s. d.		
<i>When Caution is restricted, the Fees for taking out Bond of Caution, getting it executed, attested, lodged, &c., the same as above.</i>									
72. Each necessary letter,	0	2	0	0	2	6	0	3	4
<i>In cases where the Domicile of the Deceased requires to be shown to have been in Scotland—</i>									
78. Drawing petition—first sheet, . . .	0	4	0	0	5	0	0	6	0
Each succeeding sheet,	0	2	0	0	3	0	0	4	0
74. Fee presenting petition,	0	2	0	0	2	6	0	2	6
75. Fee on interlocutor allowing a proof being pronounced,	0	3	6	0	5	0	0	6	8
76. Intimating the same to clients, . . .	0	2	0	0	2	6	0	3	4
77. Fee for precognoscence each witness examined,	0	2	6	0	3	6	0	5	0
78. For agency getting diet of proof fixed and intimating it,	0	2	0	0	2	6	0	3	4
79. Instructing officer to cite witnesses, . . .	0	2	0	0	2	6	0	3	4
80. Attendance at proof—per hour,	0	4	0	0	5	0	0	6	8
81. Fee on interlocutor disposing of the proof, . . .	0	3	6	0	5	0	0	6	8
82. Fee for procuring confirmation, viz. :— Where the value of the estate does not exceed									
£100,	0	5	0						
250,	0	10	0						
500,	0	15	0						
1000,	1	1	6						
2000,	1	11	6						
5000,	3	3	0						
Upwards of £5000,	5	5	0						
83. For drawing and inserting advertisements, as in Nos. 52 and 53.									
84. For extending, and for fair copies when necessary, except when otherwise fixed, as in No. 6.									
85. For attendances at the clerk's office, except when otherwise fixed, as in No. 19.									
86. When a competition arises for the office of executor, or any other question occurs requiring a record to be made up, or when agents are required by the Commissary to be heard, the same fees to be allowed which are allowed according to the scale for similar business in this Table; failing which, in the Table of Fees for the Sheriff-court.									

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PART XI.

OFFICERS' FEES.

ACT OF SEDERUNT regulating the Fees of Procurators and Practitioners in the Sheriff and Stewart Courts of Scotland.
—Edinburgh, 6th March 1833; renewed, 2d June 1837.

TABLE OF FEES IN CIVIL BUSINESS FOR
SHERIFF OFFICERS IN SCOTLAND.

Citations.

For executing a summons, or charging on a decree or registered protest, or using arrestment, or serving a petition or complaint, minute, interlocutor, or warrant, or intimation, or citing for examination,—for each of these several acts, and returning execution, the following fees will be allowed for officer and witnesses :—

When the demand does not exceed the sum which may be competently pursued for in the Sheriff's Small Debt Court, . . .	£0	1	6
Above the sum which may be competently pursued for in the Sheriff's Small Debt Court, and not exceeding £50, . . .	0	2	0
Above £50, . . .	0	2	6
For executing against more than one person on the same warrant, when a separate execution not necessary, each copy after the first—officer and witnesses, . . .	0	1	0
For travelling each mile after the first, from the Court-house, or the residence of the officer employed in the execution of any of the above duties ;—the distance travelled in returning after execution of the duty not to be reckoned—officer and witnesses, . . .	0	1	2
For citing a witness within a mile of the Court-house, or residence of the officer employed—officer and witnesses, when the demand does not exceed the sum which may be competently pursued for in the Sheriff's Small Debt Court, . . .	0	1	0
Above the sum which may be competently pursued for in the Sheriff's Small-Debt Court, . . .	0	1	6
For every other witness cited within the same distance, when a separate execution is not necessary—officer and witnesses, . . .	0	1	0

For travelling each mile after the first, either from the Court-house or officer's place of residence, when citing witnesses—officer and witnesses,	£0 1 0
The above Fees to include short copies of citation, and returning executions,	
For attending the proof or examination of parties when required, for each hour,	0 1 0

Briefes.

For publishing a briefe of service—officer and witnesses,	0 2 6
Attending at the service, first hour,	0 2 0
For every other hour,	0 1 0

Poidings.

When the appraised value does not exceed the sum which may be competently pursued for in the Sheriff's Small Debt Court, and the fees are not limited by the Statute 10th Geo. IV. cap. 55, or by any other Statute—

To the officer for collecting his party, framing schedule, filling up the same, and completing the poiding in legal form—for himself and party,	£0 6 0
Extending the execution of poiding, per sheet,	0 1 0
Making catalogue of poided effects, per sheet, and granting certificate for the Excise,	0 1 0
When the appraised value is above the sum which may be competently pursued for in the Sheriff's Small Debt Court, and does not exceed £12—officer and party,	0 7 6
Extending execution, per sheet,	0 1 0
Making catalogue, per sheet, and granting certificate for the Excise,	0 1 0
When the appraised value is above £12, and does not exceed £25—officer and party,	0 12 6
Extending execution, per sheet,	0 1 0
Making catalogue, per sheet, and granting certificate for the Excise,	0 1 0
When the appraised value exceeds £25, and does not exceed £50—officer and party,	0 15 6
Extending execution, per sheet,	0 1 0
Making catalogue, per sheet, and granting certificate for the Excise,	0 1 0
When the appraised value exceeds £50—officer and party,	1 1 0
Extending execution, per sheet,	0 1 0
Making catalogue, per sheet, and granting certificate for the Excise,	0 1 0
If the officer and party is necessarily employed more than two hours in executing poidings, or in travelling for that purpose, to be allowed, in addition to the above rates, for each hour after the first two—officer and party,	0 2 0
But under this last charge, the officer, for himself and party, not to have in one day more than	0 15 0

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Although the appraised value should exceed the amount of the debt, the latter is to be the rule of the officer's charge; and these charges are to be in full of all incidents, and all other expenses, excepting stamps.

Sequestrations.

Taking inventory of sequestrated effects—

When the rent to be secured does not exceed £12—officer and witnesses,	£0 5 0
When the rent is above £12, and does not exceed £25—officer and witnesses,	0 7 6
When the rent is above £25, and does not exceed £50—officer and witnesses,	0 10 0
When the rent is above £50—officer and witnesses,	0 12 6
Writing out inventory and schedule, per sheet of each, in any of the above cases,	0 1 0
If the officer and witnesses are necessarily employed more than two hours in taking the inventory, or travelling for that purpose, to be allowed, in addition to the above fees, for each hour after the first two—officer and witnesses,	0 1 6
But under this last charge, for the hours after the first two, the officer not to have in one day, for himself and witnesses, more than	0 10 0
For serving petition of sequestration when the inventory of sequestrated effects is taken by the officer—officer and witnesses,	0 1 6

Ejections.

The same fees to be allowed as in sequestrations.

Sales.

In cases of sale of pointed or sequestrated effects, an officer conducting such sale, by executing the warrant and collecting the proceeds, will be held liable for the amount of the roup-roll, and will be allowed for his trouble and risk, including auctioneer's fees, as follows;—

When the amount of the roup-roll is the sum which may be competently pursued for in the Sheriff Small Debt Court, or under, he will be allowed 7s. 6d.

When the amount of the roup-roll is above the sum which may be competently pursued for in the Sheriff's Small Debt Court, and does not exceed £100, he will be allowed at the rate of 5 per cent.

When the amount of the roup-roll exceeds £100, but does not exceed £1000, he will be allowed the above rate for the first £100, and for every additional £100, or part of £100, 8 per cent.; and when the amount exceeds £1000, he will be allowed the above rates for the first £1000, and 2 per cent. for every additional £100, or part of £100.

The above poundage to cover all charges for trouble in relation to the sale, and for collecting the proceeds, including drawing advertise-

ments and articles of roup; but the officer will be allowed all his necessary disbursements or expenses, such as advertising, paying crier, travelling charges, &c.

He will also, when the proceeds are above £20, be allowed, for an assistant clerk, 7s. 6d.

Warrants and Examinations.

Executing warrants to apprehend, and bringing for examination—officer and one assistant, for the first hour	£0 5 0
Every other hour,	0 1 0
If more than one assistant be required, the officer shall be allowed, for each additional assistant, for the first hour,	0 1 0
Every other hour,	0 0 0
But a charge for a day of 24 hours not to exceed, for officer,	0 15 0
For each assistant,	0 6 0
For executing a caption for the return of a process,	0 2 6

If the procurator who holds the process resides more than a mile distant from the clerk's office, the officer and his assistant to be paid at the same rate as when executing warrants to apprehend.

Bar Fees.

To the bar-officer, at calling each new cause,	£0 0 0
For each enrolment,	0 0 0

Fees Payable in Exchequer.

To the schoolmaster, sheriff-officer, constable, or other person employed in taking up lists of jurors, under the statute 6th Geo. IV., chapter 2, for each day of ten hours he is actually employed on this duty 7s. 2d.

Officers employed in summoning the jury and witnesses for the annual fairs; for serving precepts respecting the election of a Member of Parliament; precepts on account of the Crown; proclamations for general fasts or thanksgivings, or other the like business, to be allowed: the first mile 1s., and every mile after the first, 4d., but not exceeding 7s. 6d. for each day, or twenty miles travelled. These allowances to be in full of all travelling expenses, except ferries; but when the officer has to cross ferries he will be allowed the necessary freight of the ferry, and to charge the breadth of the ferry, and one-half more.

Jury Court Proceedings.

Summoning jurors to the Jury Court, or countermanding their attendance, or rewarning them to attend—

For each copy citation,	£0 0 0
For each juryman countermanded or rewarned	0 0 0

These allowances to be in full for summoning, countermanding, or rewarning all jurymen residing within a mile of the residence of the officer employed.

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Travelling every mile after the first, in the execution of these duties, at the rate of 7s. 6d. for each day, or twenty miles travelled.

If the same jury be summoned to the same day for the trial of different cases, the allowance for travelling to be apportioned equally amongst the different cases.

These allowances to be in full of all travelling expenses, except ferries; and also to be the rule of payment for officers in summoning juries and witnesses in cases for assessing damages, or valuing property, or other the like business.

To the officer for attending in Court to verify execution, if resident where the trial takes place, £0 2 6

If he comes from a distance, for each day of twenty-four hours he is occupied, including coming and returning, 0 7 0

Besides his actual expenses.

Note 1st. When the officer has to cross ferries, he will be allowed the necessary freight of the ferry, and to charge the breadth of the ferry and one-half more.

Note 2d. No charge to be made by an officer for any thing done in causes on the poor's roll, except for actual outlay, unless expenses shall be recovered from the opposite party.

Note 3d. The sheet of writings to be computed at 300 words, when not otherwise specified; but if the writing does not contain 300 words, to be charged as one sheet; and if, after finding the number of sheets which any such writing shall comprise, calculated at the rate aforesaid, any number of words less than 300 words shall remain, such fewer words will be charged as a sheet.

C. HOPE, *I.P.D.*

I N D E X .

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